S. HRG. 116–145

HEARING ON S. 1087, THE WATER QUALITY CERTIFICATION IMPROVEMENT ACT OF 2019, AND OTHER POTENTIAL REFORMS TO IMPROVE IMPLEMENTATION OF SECTION 401 OF THE CLEAN WATER ACT: STATE PERSPECTIVES

HEARING

BEFORE THE

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

UNITED STATES SENATE

ONE HUNDRED SIXTEENTH CONGRESS

FIRST SESSION

NOVEMBER 19, 2019

Printed for the use of the Committee on Environment and Public Works

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COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

ONE HUNDRED SIXTEENTH CONGRESS

FIRST SESSION

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C O N T E N T S

HEARING ON S. 1087, THE WATER QUALITY CERTIFICATION IMPROVEMENT ACT OF 2019, AND OTHER POTENTIAL REFORMS TO IMPROVE IMPLEMENTATION OF SECTION 401 OF THE CLEAN WATER ACT: STATE PERSPECTIVES

TUESDAY, NOVEMBER 19, 2019

U.S. SENATE,
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS,
Washington, DC.

The Committee met, pursuant to notice, at 10:05 a.m. in room 406, Dirksen Senate Office Building, Hon. John Barrasso (Chairman of the Committee) presiding.

Present: Senators Barrasso, Carper, Inhofe, Capito, Cramer, Braun, Rounds, Sullivan, Boozman, Wicker, Ernst, Cardin, Merkley, Gillibrand, Duckworth, and Van Hollen.

OPENING STATEMENT OF HON. JOHN BARRASSO, U.S. SENATOR FROM THE STATE OF WYOMING

Senator BARRASSO. Good morning. I call this hearing to order.

We are honored to welcome the Governors of the great States of Wyoming and Oklahoma today to our Committee. Governor Gordon and Governor Stitt have joined us to discuss a dangerous trend preventing our Nation from reaching full energy independence.

A group of States are holding critical energy infrastructure projects hostage by abusing a provision in the Clean Water Act. Congress created Section 401 of the Clean Water Act to give States a seat at the table before Federal permits are issued. States deserve that seat at the table. The majority of States carry out this role in a responsible way.

Recently, a select group of States have weaponized Section 401 to stop energy projects from moving forward. As the director of the New Jersey Sierra Club said last year, "Section 401 review is probably the most effective tool we have to fight these projects."

Last year, our Committee held a hearing on this important issue. Many of the same projects discussed at last year's hearing are still being blocked. The Millennium Bulk Terminal Project in Washington State remains in litigation limbo. This important project would allow cleaner burning coal from Wyoming, Montana, and other western States to be exported to markets around the world.

The State of Washington has refused to move forward with certifying the project. Washington Governor Jay Inslee denied the cer-

tification with prejudice, meaning the project will never receive State approval. Governor Inslee's denial was based on a claim that the project was bad for the environment.

Well, that is just plain wrong. The Millennium Bulk Terminal Project would reduce emissions globally. Washington State is not preventing Japan and others from burning coal. Countries like Japan and others are going to get their coal from somewhere.

Wyoming and our low sulfur coal is cleaner than coal from other parts of the world. Millennium Bulk is a $680 million project. If it had been constructed on time, the project would have already generated more than $12.5 billion in economic activity.

The project would generate thousands of good paying jobs in Washington State. Local officials and labor unions strongly support the project, and they want to see it move forward. It would grow our economy and help protect our environment. Opposing it makes no sense, but it is what happens when policy decisions are made based on emotion and not fact.

But Millennium Bulk is just one example. Since last year's Committee hearing, more projects have been delayed. The State of Oregon denied a 401 certification for a $9.8 billion liquefied natural gas terminal and pipeline project. This project would export natural gas from the western United States to Asia.

New York has denied multiple natural gas pipeline certifications. Just like with the State of Washington, New York's decisions are hurting the environment. The lack of natural gas is causing more homes and businesses to rely on fuel oil, a fuel that emits 38 percent more carbon dioxide than natural gas. The Environmental Defense Fund recently noted, due to pipeline constraints, more of the dirtier fuel oils have been and will be burned across the Eastern Seaboard.

As the Wall Street Journal observed recently, inadequate natural gas pipeline capacity leads to more pollution and higher energy costs for American consumers. The Journal writes, "The average household that uses natural gas for heating this winter will spend $580 compared to $1,501 for heating oil and $1,162 for electricity."

That is why I introduced the Water Quality Certification Improvement Act of 2019, so that States cannot unfairly block energy projects. President Trump also issued an executive order to update the almost 50 year old regulations.

Most States aren't abusing their Clean Water Act authority. States like Wyoming, Oklahoma, and others have found responsible ways to protect the water within their borders while growing their economies.

The Governors of Wyoming and Oklahoma are here to testify because Section 401 reform is critical to those States.

Thank you again for joining us today, and I would now like to turn to Ranking Member Duckworth for opening comments.

OPENING STATEMENT OF HON. TAMMY DUCKWORTH, U.S. SENATOR FROM THE STATE OF ILLINOIS

Senator DUCKWORTH. Thank you, Mr. Chairman.

Thank you again for convening this hearing, and welcome to all the witnesses who are here with us today.

Water quality issues are front of mind for Illinoisans, because we and our neighbors are the stewards of the Nation's largest body of freshwater, the Great Lakes. The Clean Water Act is the landmark law that helps us be good caregivers. It is our first line of defense in ensuring the integrity of the Great Lakes and safeguarding the quality of the rivers, streams, and tributaries that feed these national treasures.

The Great Lakes provide drinking water for tens of millions of Americans and support 1.5 million direct jobs. Their commercial, recreational, and tribal fisheries are valued at more than $7 billion.

In addition to being our main source of drinking water and providing the region with major economic opportunity, the Great Lakes improve our quality of life in the Midwest. They are where we fish and where we swim. Weakening the Clean Water Act would threaten this way of life.

That is why I strongly oppose the Trump administration's proposal that would degrade Section 401 of the Clean Water Act and gut protections for vast bodies of water that serve communities throughout the region. Section 401 guarantees that States and tribes have a voice and say in projects that require federally issued permits and licenses. Specifically, it rejects a one size fits all system by establishing a certification requirement that enables States and First Nation tribes to help optimize the conditions that must be met to secure a permit or license for a special project. Very reasonable.

I recognize that developers who fail to meet the requirements identified by States and tribes may be frustrated by denials in earning Federal approval for a given project. However, silencing the voices and inputs of those Americans most directly impacted is the wrong approach, especially since these voices often represent the States and the tribes and the tribal governments that are on the front lines working to safeguard their water supplies.

It is disappointing, but not surprising, that the Trump administration only cares about States' rights when it is to look the other way, allowing corporate polluters to destroy streams and pave over wetlands. During this hearing, we will hear that Section 401 leads to delays on energy projects and that it is abused to stop projects that are unpopular.

However, when I asked the EPA for more information on how much time Section 401 adds to the permitting process, the EPA could not provide any information. Today's proposal would place highly restrictive requirements on what activities and impacts a State can review, as well as restrictive deadlines on the process. It would also give the Federal Government a veto on projects, and there would be no notice to downstream States for proposed projects.

Many would be shocked to learn that the Clean Water Act was actually passed by a bipartisan majority in Congress and signed into law by a Republican President. However, policymakers and constituents of prior generations had lived through decades of unchecked dumping of untreated sewage, industrial waste, and agricultural runoff into our waters.

We must never take for granted how, over the past 50 years, the Clean Water Act has reduced or eliminated pollution in our Na-

tion's waterways and slowed the rate of wetlands loss. Congress should honor this progress by recognizing that more work remains to be done today, tomorrow, and in future years.

Just last year, every beach in Illinois that was tested by the Environmental Protection Agency had to close for at least 1 day, and South Shore Beach in southern Chicago was closed for nearly 40 days because of water contamination. My constituents want to swim on these beaches all summer long, and we will never achieve that goal by weakening the Clean Water Act. Simply put, healthy water means healthier families, communities, and economies.

That is why I will continue fighting to preserve and strengthen the Clean Water Act, and always put the health and well being of my constituents above all other interests.

Mr. Chairman, thank you again for holding this hearing, and I look forward to hearing from our witnesses.

Senator BARRASSO. Well, thank you very much, Senator Duckworth, for your opening statement.

Now, we will turn to our witnesses. I am very pleased to introduce Governor Mark Gordon, who was sworn in as the State of Wyoming's 33rd Governor on January 7th of this year. Governor Gordon has served the people of Wyoming for years. He is a native of Kaycee, Wyoming, in Johnson County, grew up and worked on his family's ranch, became a very successful rancher and businessman himself.

Prior to his election as Governor, he also served as State Treasurer from 2012 until this January. His leadership as State Treasurer resulted in improved returns on State investments, better protection of State savings, and increased transparency for the public.

Governor Gordon's efforts to improve the State's financial portfolio resulted in Wyoming being ranked No. 1 in the country for transparency. As Governor, he is working to make Wyoming's government more accessible, productive, and efficient.

Governor Gordon, we are honored that you are here testifying before the Committee, and I know you have much to share about Wyoming, our State's commitment to responsible energy production, and the State's strong record of environmental protection.

But before we go to you—and I am looking forward to our continued partnership to grow Wyoming's economy—before calling on you, I would like to ask Senator Inhofe if he would like to introduce his esteemed Governor and first lady.

Senator INHOFE. Thank you, Senator Barrasso.

Mr. Chairman, I am proud to introduce to the Committee Oklahoma's First Lady, Sarah Stitt.

Sarah, would you stand up, please?

[Applause.]

Senator INHOFE. With her is Governor Stitt.

[Laughter.]

Senator INHOFE. Governor Stitt is relatively new to the world of government, but he has been well known for a long time for his accomplishments in the State of Oklahoma. A fourth generation Oklahoman, Kevin spent his life as an entrepreneur, and founded Gateway Mortgage about 20 years ago. That has been a model. Under his leadership, it has gone from a small mortgage company

to a national giant, operating in more than 40 States with over 1,200 employees.

Last year, Kevin was elected Governor, and his administration is already reforming our State. He is focused on all the right things, with a vision of making Oklahoma a top 10 State in all key statistical areas, and he is well on his way by cutting bureaucracy, growing jobs, and improving Oklahoma's roads and bridges.

I have gotten to know him well and am confident that he will continue to make Oklahoma proud, and I look forward to hearing his testimony today. He has accomplished so much in such a short period of time, and it shows that States are relevant.

Thank you, Mr. Chairman.

Senator BARRASSO. Well, thank you very much, Senator.

I would also like to welcome to the Committee today Laura Watson, who is the Senior Assistant Attorney General and Division Chief for the Washington State Attorney General's Office.

Welcome.

I want to remind the witnesses that your full written testimony will be made part of the official hearing record, so please try to keep your statements to 5 minutes so that we have time for questions. We look forward to hearing your testimony.

Governor Gordon, would you please begin?

STATEMENT OF HON. MARK GORDON, GOVERNOR, STATE OF WYOMING

Mr. GORDON. Thank you, Mr. Chairman, it is a pleasure to be here.

Well done, Senator Inhofe.

Thank you also, Ranking Member Duckworth, and members of the Committee.

Wyoming is blessed with an abundance of resources and has thus been the center of energy production and a leader in environmental protection. Much of our economy is in fact based on our ability to export energy to heat homes, light cities, and better lives.

We are also home to thriving wildlife and some of the Nation's cleanest air and water. Wyoming is headwaters to three of the Nation's major rivers: the Missouri, the Colorado, and the Columbia. Protecting water quality within our State has always been important to Wyoming. We recognize the value of clean water and earnestly strive to protect it.

This is done, in part, through responsible application of the Clean Water Act Section 401. Regrettably, a recent Clean Water Act Section 401 decision by Washington State imperiled the development of infrastructure that could expedite the way Powder River coal gets to overseas customers.

In the case of Millennium Bulk Terminal in 2017, Washington State blocked the terminal's construction by inappropriately denying Section 401 certification, citing several non-water quality related impacts. This was a protectionist maneuver, based on alleged effects that are outside the scope of Section 401. With a fanciful interpretation of Section 401 processes, Washington State actively prevented coal mined in Wyoming, Montana, Utah, and Colorado efficient access to foreign markets.

The Clean Water Act, particularly Section 401, is designed to allow States to protect water quality within their boundaries. It is not a tool to erect trade barriers based on political or parochial whims, nor a way to preempt interstate commerce.

Reform of Section 401 is not an assault on the environment, a means to prevent States from taking control of their own destiny, or a cloaked attempt at climate change denial. We acknowledge that CO_2 concentrations in our atmosphere are an urgent concern for our climate and must be addressed effectively, while we also recognize that the world needs energy.

With commitment, vision, and courage, we can take advantage of all our resources in a responsible manner to solve for both a cleaner and better world. I come to you today with a goal of finding solutions. We can protect water quality, build infrastructure responsibly, address climate change, and promote interstate commerce under Section 401.

Clean Water Act Section 401 reform should be driven by facts and designed to minimize negative externalities and social cost. The Clean Water Act already provides a framework for this by granting broad responsibilities to States under Section 401 while allowing the necessary flexibility to fulfill their roles as co-regulators to protect our Nation's waters.

Unfortunately, the Section 401 certification process has also led to inconsistent interpretation and implementation among States. Loopholes in Federal environmental regulations should not be exploited to advance peripheral agendas. Section 401 certification decisions must be focused, efficient, reliable, and appropriately balance the Federal Government's province with State autonomy.

Chairman Barrasso's bill, S. 1087, entitled Water Quality Certification Improvement Act of 2019, recommends real improvements to the Clean Water Act Section 401 certification process, while also respecting the rights of States under the Commerce Clause to the United States Constitution. I emphatically support these efforts.

In Wyoming, our Section 401 certifications are based on water quality and completed within a reasonable time. That is usually around 60 days on average. Elsewhere, some States apparently have found in Section 401 of the Clean Water Act novel ways to block projects rather than using it correctly, as a regulatory framework to address attendant water quality concerns.

The congressional purpose of the Clean Water Act was to protect and maintain water quality. However, some certifying authorities have interpreted Section 401 to include tangential, non-water quality related considerations in their review.

In Washington, for example, the Department of Ecology decided to employ the State's open ended discretionary policy to deny the Millennium Bulk Terminal Section 401 certification. The department's decision was heavily skewed on non-water quality based impacts, ranging from greenhouse gas emissions, from rail noise and vibration from trains, social and community impacts from noise and air pollution, decreased rail safety, as well as tribal and cultural resource impacts.

The inclusion of these factors is arguably superfluous to the original intent of the Clean Water Act. Properly, the scope of Section 401 review or action must directly connect to addressing water

quality impacts from potential discharges associated with a proposed federally licensed or permitted project. The Washington Department of Ecology denial of 401 certification for the Millennium Bulk Terminals was fickle, based on loose if not absent connection to impacts on water quality.

Furthermore, when Washington State denied the project with prejudice, it precluded the terminal's opportunity to amend its application or ever to reapply. Evidently, Washington found Section 401 useful as a tool to curtail a specific project it found displeasing, rather than allowing the project's applicant the opportunity to address appropriate associated water quality impacts.

The two main areas that I advocate for reform in context with Wyoming's experience relate to one, the scope of environmental reviews, and two, the basis for certification denials. Certification denials must have a clear and reasonable assertion that the project activities would, No. 1, result in violation or fail to conform to one or more surface water quality standards; two, result in an increase in pollutant loading to a Clean Water Act 303(d) listed water; or three, would not conform to applicable 401 certification conditions or Corps nationwide permit conditions.

Finally, let me speak to the correct implementation of the Clean Water Act, cooperative federalism, and the essential rights of States. States must be afforded reasonable authority over land and water resources within their borders. Section 401 is an essential tool granted by Congress which was intended to give States discretion in reviewing and conditioning 401 certifications and to ensure concordance with both Clean Water Act and State surface water quality standards.

Still, proper implementation of Section 401 of the Clean Water Act should line up with the original intent and also recognize the individual jurisdictional rights of States to manage their own affairs and conduct commerce. The draft Water Quality Certification Improvement Act of 2019, sponsored by Chairman Barrasso and Senators Daines, Inhofe, Capito, Enzi, and Cramer, offers a much needed improvement to Section 401 of the Clean Water Act by reducing uncertainty and limiting the potential for misuse.

Rules and regulations should be squarely centered on purpose, in this case, water quality. They should not become an all of the above artifice to thwart unwelcome projects with prejudice.

I appreciate your efforts to clarify Section 401 implementation and the EPA's recent efforts to modernize its Section 401 guidance. Both are needed, and I look forward to answering your questions.

Thank you.

[The prepared statement of Mr. Gordon follows:]

The Honorable Mark Gordon
Governor of Wyoming

Mark Gordon was elected Wyoming's 33rd Governor, on November 6, 2018. He was sworn into office on January 7, 2019.

Growing up on the family ranch in Johnson County, Governor Gordon learned the values of hard work and integrity and the importance of working together. As Governor, he brings those values to the table in pursuing his commitment that Wyoming continues to be a place where its citizens can pursue their dreams while retaining its unique character. He is a strong believer in Wyoming's ability to chart its own course and a staunch defender of its interests to do so.

Governor Gordon is working on efforts to set Wyoming on a sustainable fiscal path and making government more accessible, productive and efficient. As part of those efforts, Gordon seeks to refocus government to better assist local communities with the tools and resources needed to thrive and set their own direction. He is also dedicated to ensuring that citizens have access to quality education, including safer schools, advanced degrees, and career and technical education opportunities.

Governor Gordon served as Wyoming State Treasurer from October 2012 until January 2019 when he was sworn in as Governor. As State Treasurer, he led a transformation of the office resulting in improved returns on state investments, better protection of state savings, and increased transparency and access to state financial data for the public. His efforts to improve transparency surrounding the state's financial portfolio resulted in Wyoming being ranked number one in the United States for transparency and third in the world among all sovereign funds.

Governor Gordon and his wife Jennie have four grown children, Anne, Aaron with wife Megan, Bea with fiancé Austen and Spencer with wife Sarah and their son Everett.

Senate Environment & Public Works Committee Testimony -- Nov. 19, 2019

Hearing title: "Hearing on S. 1087, the Water Quality Certification Improvement Act of 2019, and Other Potential Reforms to Improve Implementation of Section 401 of the Clean Water Act: State Perspectives."

Good afternoon Chairman Barrasso, Ranking Member Carper, Members of the Committee. My name is Mark Gordon. I am the 33rd Governor of the State of Wyoming. Thank you for the opportunity to discuss with you Wyoming's perspective of the need for Clean Water Act Section 401 reform.

Wyoming is blessed with an abundance of resources: coal, oil, gas, uranium, sun, and wind -- lots of wind. Wyoming is headwaters to three of the nation's major rivers -- the Missouri, the Colorado, and the Columbia. Protecting water quality within our state, and when it flows across state boundaries, has always been important to Wyoming. We recognize the value of clean water and its importance to downstream users in the northwest, the southwest, and the center of this great nation. It is in our best interest to protect our waters. This is done, in part, through responsible application of the Clean Water Act Section 401 certification decisions.

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Wyoming has long been a center of energy production and a leader in environmental protection. We provide the fuel to heat homes, light cities and run American factories. We are home to thriving wildlife, clean air and water. The bulk of Wyoming's economy is dependent upon exporting our energy resources to where it is needed. Unfortunately, a recent Clean Water Act Section 401 certification decision conducted by Washington State imperiled the development of infrastructure that would enable Wyoming's access to energy markets overseas.

In the case of the Millennium Bulk Terminal, in 2017, Washington State blocked the terminal's construction by inappropriately denying the State's Section 401 certification on account of non-water quality related impacts -- a protectionist maneuver based on alleged effects that are outside of the scope of Section 401. Instead, through imaginative interpretation of Section 401 processes, Washington State actively prevented coal mined in Wyoming, Montana, Utah and Colorado from moving to foreign and interstate commerce.

The Clean Water Act, particularly Section 401, is designed to allow States to protect the water quality. It is not a tool to erect a trade barrier based on political whims or parochial politics. I strongly contend that Section 401 must not be used to impede lawful interstate commerce. Thus, Section 401 reform is not an "assault on the environment," a means to prevent states from "taking control of their own destiny" or, at worst, a cloaked attempt at "climate change denial." We know the world needs power to build things, transport things, and improve the quality of life. We acknowledge that CO_2 concentrations in our atmosphere are an urgent concern for our climate that must be addressed effectively. With commitment, vision, and courage, we can take

advantage of all our resources in a responsible manner. However, Section 401 certification decisions are not the appropriate means to achieve this.

Clean Water Act Section 401 reform should be focused, be driven by fact and minimize the negative externalities and social costs that result when loopholes in federal environmental regulations are used to advance peripheral agendas. I come to you today with the goal of finding solutions: we *can* protect water quality, build infrastructure responsibly, address climate change, and promote interstate commerce under Section 401. The Clean Water Act already provides a framework for this by granting broad responsibilities to states under Section 401 while allowing the necessary flexibility to fulfill their roles as co-regulators to protect our nation's waters. Section 401 certification decisions, however, have also led to inconsistent interpretation and implementation of the statute among states. This must be fixed.

Section 401 certification decisions should be focused, be efficient, and appropriately balance the federal government's jurisdiction with state autonomy. EPA's recent effort to update its guidance for Section 401 certification is a well-needed step toward correcting the misapplication of Section 401 by some states to stymie the industries and commerce of others. President Trump's Executive Order (EO) 13868 re-centers the application of the law on its original purpose as a precise tool to protect our water quality, rather than a blunt tool to block commerce and advance the individual political interests of one state over another. Chairman Barrasso's bill S. 1087 entitled "Water Quality Certification Improvement Act of 2019" takes a hard look at the aspects to Clean Water Act Section 401 certification processes that are in need of improvement. I emphatically support these efforts.

In Wyoming, our Section 401 certifications are always water quality-based and completed within reasonable time frames of review (that is, 60 days or less, on average). Outside of our state, there are a handful of ways Clean Water Act Section 401 certification processes have acted as a barrier against Wyoming. The two main areas that I advocate for reform in context to Wyoming's experience relate to: 1) the scope of environmental reviews, and 2) the basis for certification denials.

First, there is no risk of overstating the importance of the Congressional purpose of the CWA: to protect and maintain water quality. Some certifying authorities have previously interpreted Section 401 in a manner that resulted in the incorporation of non-water quality related considerations into their certification review processes. Washington Department of Ecology's decision to employ the State's discretionary, policy-based denial of the Millennium Bulk Terminal Section 401 certification is one such example. Washington's 401 certification denial was heavily skewed on non-water quality-based adverse impacts. These include nine non-water quality-based reasons for certification denial, ranging from: greenhouse gas emissions from rail, noise and vibration from trains, social and community impacts from noise and air pollution, decreased rail safety, as well as tribal and cultural resource impacts, to name a few. The inclusion of these factors was tangential and therefore not relevant to the intent of the implementation of these regulations.

I strongly advocate that the scope of a Section 401 review or action must directly connect to the purpose of the Clean Water Act, those being water quality impacts from the potential discharge associated with a proposed federally licensed or permitted project.

Second, the basis for certification denials are of major interest to Wyoming. Again, Washington Department of Ecology's denial of the Millennium Bulk Terminal Section 401 certification was discretionary with loose, if not absent, connection to impacts on water quality. Washington State denied the project proponent's 401 certification application "with prejudice," meaning that the proponent could never reapply. Wyoming is keenly aware that some states may opt instead to use certification denial "with prejudice" as a tool to hamper projects from being implemented.

I advocate that certification denials must have a clear and reasonable assertion that project activities would: 1) result in violation or fail to conform to one or more surface water quality standards, 2) result in an increase in pollutant loading to a Clean Water Act 303(d) listed water, or 3) would not conform to applicable 401 certification conditions or Corps nationwide permit conditions.

Separately, there is considerable debate concerning Section 401 certifications centering on cooperative federalism and States' rights. I wholeheartedly support the general interpretation that state authority over land and water resources within their borders must be recognized and preserved. I agree that Section 401 is an essential tool granted by Congress intended to allow states a great deal of discretion in reviewing and conditioning 401 certifications to ensure compliance with the Clean Water Act and state surface water quality standards. We need to make

sure Section 401 implementation lines up with the Clean Water Act's intent. This is founded on the principle that states can exercise their discretion but not abuse it.

In closing, a modernized approach to Section 401 will reduce uncertainty and prevent misuse. Congress needs to take action so we are not left with ambiguities or regulations that creep to suit sectarian or selfish political aims but are rather squarely centered on purpose -- in this case water quality. I appreciate any effort that can address this issue, especially the draft "Water Quality Certification Improvement Act of 2019" sponsored by Chairman Barrasso and Senators Daines, Inhofe, Capito, Enzi, and Cramer. I also support regulatory fixes aimed at focusing Section 401 certification implementation, such as EPA's recent efforts to modernize its Section 401 guidance.

I look forward to working with the Environment and Public Works committee to answer any questions you may have of me concerning Executive Order 13868 and related Section 401 reform efforts. Wyoming stands ready to work on this. Thank you.

January 6, 2020

United States Senate
Committee on Environment and Public Works
410 Dirksen Senate Office Building
Washington, DC 20510

Re: "*Hearing on S. 1087, the Water Quality Certification Improvement Act of 2019, and Other Potential Reforms to Improve Implementation of Section 401 of the Clean Water Act: State Perspectives 401*" on November 19, 2019

Dear Chairman Barrasso and Ranking Member Carper:

Thank you for the opportunity to submit responses to the Senate Committee on Environment and Public Works follow-up questions regarding my testimony at the November 19, 2019 "*Hearing on S. 1087, the Water Quality Certification Improvement Act of 2019, and Other Potential Reforms to Improve Implementation of Section 401 of the Clean Water Act: State Perspectives 401.*" I have provided commentary relative to the follow-up questions submitted by Senator Merkley as follows:

Topic #1: Section 401 review timelines

Question:
"S. 1087 will limit state agencies to just 90 days in which to identify all necessary materials, information, or deficiencies in an application for Clean Water Act Section 401 certification. There are certainly challenges for states to effectively evaluate water quality implications for very large and complex projects, such as the controversial pipeline projects discussed during the hearing. I am very concerned that expedited reviews will impede a state's ability to implement the objective of the Clean Water Act, which is to "to restore and maintain the chemical, physical, and biological integrity of the nation's waters." At the hearing, you stated that one year, which is the existing Clean Water Act requirement, is a reasonable timeline for state water quality evaluations.

- Please provide further explanation of the State of Wyoming's 401 review process and why you believe less than one year is an unreasonable review timeframe."

Response:

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To clarify, I do not believe that less than one year is an unreasonable review timeframe. As I stated in my hearing testimony, Wyoming's Section 401 certifications are always water quality-based and completed within reasonable time frames of review (that is, 60 days or less, on average), so we could easily meet the 90 day timeframe as proposed by S. 1087. However, since Section 401(a)(1) of CWA already directs that states must act on a certification request "...within a reasonable period of time (which shall not exceed one year)...," it is reasonable to use up to the entirety of that time period as allowed by law.

Earlier this year, I provided comments to EPA during the agency's pre-proposal and draft Section 401 guidance and regulations updates. I stated that I support the one-year maximum timeline limit in order to allow states to use their own discretion as to how to meet the requirement; I also suggested that EPA set enforcement requirements to ensure adherence to the one year certification requirement.

Again, I agree that Section 401 is an essential tool granted by Congress intended to allow states a great deal of discretion in reviewing and conditioning 401 certifications to ensure compliance with the Clean Water Act and state surface water quality standards. We need to make sure Section 401 implementation lines up with the Clean Water Act's intent. This is founded on the principle that states can exercise their discretion but not abuse it.

Regarding Wyoming's 401 review process, Wyoming implements the following actions that have improved and streamlined 401 certification decisions:

a. Early collaboration with the applicant, Corps of Engineers (Corps) and other partners at the pre-application consultation phase to address outstanding issues prior to submittal of the application for Section 401 certification and 404 verification.

b. In collaboration with the Corps, streamlining the application process such that applications are submitted to both the Corps and Wyoming Department of Environmental Quality (WDEQ) simultaneously for both 401 certification and 404 verification.

c. To ensure a complete application and reduce permitting delays, Wyoming has developed guidance to ensure an application for 401 certification is complete upon submittal. Requirements for a complete application include quantitative demonstrations of no adverse net impact to a water with respect to applicable state surface water quality standards, mitigation or corrective action plans, monitoring plans and reporting measures, and concurrence with appropriate state and federal agencies. For projects that occur on 303(d) listed impaired waters, a complete application requires a demonstration that the activity will either result in no net degradation of the existing quality or will improve water quality. Improvements in water quality on a 303(d) listed water require an estimate of pollutant load reduction.

d. WDEQ and the Corps work collaboratively to develop regional general conditions for nationwide permits as well as standard 401 certification conditions for categorically certified activities.

e. Inter-agency (i.e.- WDEQ, Corps, and others) meetings are held at least once per year to address outstanding issues, further streamline the permitting and certification process, and to consult about upcoming large projects as well as successes and lessons learned from past permitted projects.

f. At a minimum, Wyoming schedules monthly calls with the Corps to consult about upcoming projects, concerns, permitting issues, etc.

g. As part of streamlining certification decisions, Wyoming has categorically certified some nationwide permits that cover common activities with low environmental risk and/or standardized practices that effectively address water quality issues. These categorical certifications do not require an individual review by WDEQ. Other nationwide permits may require individual certification or categorical certification depending on the extent of the project and/or the water's surface water classification. Certification for a few nationwide permits with no applicability in Wyoming have been waived.

h. For projects required to undergo a National Environmental Policy Act (NEPA) review, appropriate processes or measures to address unresolved water quality concerns are developed with the project proponent prior to a final EA or EIS. These measures can be expanded upon and inserted as conditions of the 401 certification which is generally issued after the record of decision.

Topic #2: Fishing and recreation

Question:
Complex projects that span large geographic areas can impact many water bodies. If a state is only able to evaluate the discharge rather than the permitted activity, as laid out in S.1087, a state may not be able to require water quality conditions to limit adverse environmental impacts from the construction of projects, such as a pipeline. The Jordan Cove LNG pipeline project in Oregon is expected to cross an estimated 485 bodies of water, 7 lakes, 326 waterways, and 150 wetlands. There is the potential for adverse impacts from a pipeline on many of these waters; Oregonians across the state are concerned about the impacts on the fishing and recreation industries, as well as the impacts on aquatic ecosystems. Wyoming is similar to Oregon in that many rely on rivers and streams as their source of income and food.

- As Governor, are you concerned about large projects that can impact the fishing and recreation industries of Wyoming?
- Do you rely on the 401 review process to ensure that these industries are not harmed?

Response:
Wyoming is headwaters to four of our nation's major rivers. We rely upon recreation and fishing, among other industries, as part of our State's economic portfolio. It is in our interest to protect our own waters: we know best how to do it in the most responsible manner that protects our water quality as well as our economic interests. I believe the State has the proper means to ensure any discharges associated with a proposed federally licensed or permitted project maintain water quality in Wyoming streams and lakes that protect fisheries and recreation. This is properly maintained under Wyoming's delegated authorities over Clean Water Act Section 303 (water quality standards, total maximum daily loads) and Section 402 (surface water discharge permits), concurrent with water quality requirements under Wyoming law.

I have always contended that Section 401 review or action must directly connect to the purpose of the Clean Water Act, those being water quality impacts from the potential discharge associated with a proposed federally licensed or permitted project. Any project, large or small, that is subject to Section 401 certification must undergo proper review under the requirements of the law.

Proper review of impacts to surface water quality becomes particularly important when considering plans for activities like stream restoration projects and infrastructure projects (e.g.- bridge construction) that can result in both short-term and long-term impacts to aquatic life uses (e.g.- fisheries) and other protected uses like recreation and public drinking water supplies. However, review of these projects are and should remain limited. The Section 401 review process must directly align with federal and state regulations for water quality protection and not extend beyond the scope and intent of Section 401 of the Clean Water Act.

Thank you for the opportunity to participate in the hearing and respond to your questions. I look forward to working with the Environment and Public Works committee and EPA to reduce uncertainty and prevent misuse of Section 401.

Sincerely,

Mark Gordon
Governor

CC: Andrew Wheeler, Administrator, United States Environmental Protection Agency
Todd Parfitt, Director, Wyoming Department of Environmental Quality

Senator BARRASSO. Thank you very much, Governor Gordon.
Governor Stitt.

**STATEMENT OF HON. J. KEVIN STITT,
GOVERNOR, STATE OF OKLAHOMA**

Mr. STITT. Chairman Barrasso, Ranking Member Duckworth, and senior member Senator Inhofe, thank you for inviting me to testify on why it has important for my State of Oklahoma to have clarity and certainty around Section 401 of the Clean Water Act.

As you may be aware, I am 11 months into being Governor of the great State of Oklahoma. Less than 1 year ago, I was in the private sector, building a business in two of the most regulated sectors in the United States, banking and mortgage lending. I started my company from scratch and built it to over 1,200 employees doing business in 41 States.

I say this because I want to share that as a former CEO, I understand the importance of common sense regulations. Efficiency and certainty from State and Federal regulators allow a CEO to put more of his or her focus on creating jobs and growing the economy. Anything short of regulatory certainty and predictability stifles job creation, chills capital markets, and slows down innovation for advances that make us a better and stronger society.

Today, serving as Governor of the great State of Oklahoma, I have had the honor and opportunity to view the regulatory environment from this side of the government. I can speak with great assurance that regulations are best left to the States as often as possible. We know our people, we know our geography, we know our economies, and we know best when innovation demands regulatory flexibility, and when protecting our citizens requires action.

Oklahoma is a huge success story for States' rights and Federal partnership. I am here today to share with you why we must continue to strike this balance between modernizing and clarifying Section 401 of the Clean Water Act.

As you all know, Oklahoma has a long and storied history of leadership and innovation in the production of traditional fossil energy. We are grateful to Senator Inhofe who has been a champion for our State on these issues.

Today, Oklahoma ranks No. 3 in natural gas production. We rank No. 4 in oil production, and we are a leader in natural gas liquids that form the building blocks for the products Americans use every day. We are proud to be considered the pipeline capital of the world.

Oklahoma is top 10 in all aspects of energy, as well as in the environment. We are enjoying some of the cleanest drinking water in our State's history.

We have the most practical regulatory framework and some of the most efficient permitting review times in the country. We are meeting our obligations and certifying water quality standards within 60 days of the application, well under the 1 year timeline proposed by the Environmental Protection Agency.

Thanks to Oklahoma produced natural gas and the shale revolution, my State has also reduced emissions in SO_x, NO_x, and CO_2 at more than double the national average. The national average for CO_2 reduction is nearly 15 percent since 2015, while Oklahoma has

reduced its CO_2 emissions in the power sector by more than 37 percent, just since 2011.

We have made major advancements in environmental quality while also maintaining the No. 1 ranking in cheapest electricity cost to the customer. As a result, Oklahoma is the leading generator and exporter of power in the Southwest Power Pool, which is our regional transmission organization. In fact, 28 percent of the power produced in Oklahoma is sent out across transmission lines in the SPP, exporting Oklahoma's emission reducing energy to all of our neighboring States.

Oklahoma is the epicenter of America's energy dominance, and we want our success to be shared with our neighbors and our fellow States as far north as Maine, and as far south as the ports in Houston, Texas. Unfortunately, the misuse of Section 401 threatens Oklahoma's potential and the endless opportunities for our 4 million residents. It prevents Oklahoma from achieving all it can be because of a loophole within Section 401 that is allowing a small handful of coastal States to dictate the future for all the other 40 States.

Unfortunately, this is just unacceptable. The point was absurdly exemplified the last winter when a Russian tanker of liquefied natural gas was sitting in the Boston Harbor, providing for the Northeast U.S. from losing its heat during last winter's polar vortex. Imagine what that picture communicates to hard working oil and natural gas employees around the country. Do we really want our jobs and our tax dollars needlessly going to Russia?

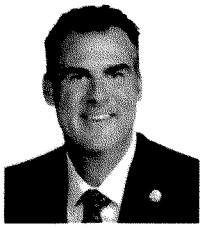
For that purpose, I support the actions taken by EPA and members of this Committee to restore certainty to the Clean Water Act permitting and certification process under Section 401. A clear scope and a reasonable timeline are not invasive to States' rights. The current proposed rule, and the opportunity to strengthen this legislatively does nothing to prevent Oklahoma's regulators from properly and scientifically considering whether a project negatively affects water quality in our State.

It has been almost 50 years since this regulation has been reviewed, and I support creating a reasonable baseline for Clean Water Act permitting and certification of interstate infrastructure, whether it is transmission lines, pipelines, or an interstate highway, to get Oklahoma's products to the market.

Once again, thank you for allowing me to be here today. I look forward to answering your questions.

[The prepared statement of Mr. Stitt follows:]

The Honorable J. Kevin Stitt
Governor of Oklahoma



J. Kevin Stitt is the 28th governor of Oklahoma. Governor Kevin Stitt is leading the state with a vision to become Top Ten in critical categories, from government accountability to job growth, infrastructure, education and more.

Governor Stitt is an Oklahoman entrepreneur and businessman who founded Gateway in Tulsa, Oklahoma, in 2000. Starting Gateway with only $1,000 and a computer, Stitt grew his business into a nationwide mortgage company operating in more than 40 states and servicing more than $17 billion in residential mortgages. Stitt then decided to tackle the banking industry and began the process in 2018 of merging with Farmers Exchange Bank, a community bank originally founded in 1935 in Western Oklahoma. Upon completion of the merger, Stitt established Gateway First Bank, which today is one of the ten largest banks by assets in Oklahoma with $1.2 billion in assets, 160 mortgage centers across the U.S., and more than 1,200 employees. Gateway is headquartered in Jenks, Oklahoma.

Governor Stitt is a fourth-generation Oklahoman, who graduated from Norman High School and is an alumnus of Oklahoma State University, where he received a degree in accounting in 1996. Stitt and his wife, Sarah, have six children and have been married for 21 years.

Senate Environment & Public Works Committee Testimony - Nov. 19, 2019

Hearing titled: "The Water Quality Certification Improvement Act of 2019, and Other Potential Reforms to Improve Implementation of Section 401 of the Clean Water Act: State Perspectives"

Chairman Barrasso, Ranking Member Carper, and senior member Senator Inhofe, thank you for inviting me here today to testify on why it is important for my state of Oklahoma to have clarity and certainty around Section 401 of the Clean Water Act.

As you may be aware, I am 11 months in to being governor of the great state of Oklahoma. Less than one year ago, I was in the private sector building a business in two of the most regulated sectors in the United States – banking and mortgage lending. I started that company from scratch and built it into 41 states and 1,300 employees.

I say this, because I want to share that, as a former CEO, I understand the importance of common-sense regulations. I know what motivates and incentivizes businesses to come into compliance in a timely fashion. I believe businesses want to do the right thing and they welcome baseline rules where necessary. They want to take care of their employees and the communities where they do business.

Efficiency and certainty from state and federal regulators allow a CEO to put more of his or her focus on creating jobs and growing an economy. Anything short of regulatory certainty and predictability stifles job creation, chills capital markets and slows down innovation for advances that make us a better and stronger society.

Today, serving as governor of the great state of Oklahoma, I have had the honor and opportunity to view the regulatory environment from the side of the government. I can speak with great assurance that regulations are best left to the states as often as possible. We know our people. We know our geography. We know our economies. And we know best when innovation demands regulatory flexibility and when protecting our citizens requires action.

Oklahoma is a huge success story for state's rights and federal partnership, and I am here today to share with you why we must continue to strike this balance by modernizing and clarifying Section 401 of the Clean Water Act.

As you all know, Oklahoma has a long and storied history of leadership and innovation in the production of traditional fossil energy. We are proud to claim that we discovered hydraulic fracturing in 1949 in Duncan, Oklahoma, and we are proud of our pioneering spirit that has allowed our natural resources to fuel and feed the world and to make America energy independent. We are grateful to Senator Inhofe who has been a champion for our state on these issues.

Today, Oklahoma is #3 in natural gas production, #4 in oil production, and a leader in natural gas liquids that form the building blocks for the products Americans use every day. We are home to the largest oil reserves in the world and we are considered the pipeline capitol of the world with hundreds of oil and natural gas liquid pipelines running through our state.

Oklahoma is Top Ten in all aspects of energy as well as in the environment. We are enjoying some of the cleanest drinking water in our state's history. We have the most practical regulatory framework and some of the most efficient permitting review times in the country. We are meeting our obligations and certifying water quality standards within 60 days of the application, well under the one-year timeline proposed by the Environmental Protection Agency (EPA).

Thanks to Oklahoma-produced natural gas, and the shale revolution, my state has also reduced emissions in SO2, NOX, and CO2 at more than double the national average. The national average for CO2 reduction is nearly 15% since 2005, while Oklahoma has reduced its CO2 emission in the power sector by more than 37% since only 2011 and made even greater reductions in SO2 and NOX.

We have made major advancements in environmental quality while also maintaining our #1 ranking for delivering the cheapest electricity to the customer.

As a result, Oklahoma is the leading generator and exporter of power in the Southwest Power Pool (SPP), which is our Regional Transmission Organization (RTO). In fact, 28% of the power produced in Oklahoma is sent out across transmission lines in the SPP exporting Oklahoma's emissions-reducing energy to our neighboring states.

Oklahoma is the epicenter of America's energy dominance. And we want our success to be shared with our neighbors and our fellow states as far north as Maine and as far south as the ports of Houston, Texas, and beyond.

Unfortunately, the misuse of Section 401 threatens Oklahoma's potential and the endless opportunities for her 4 million residents. It prevents Oklahoma from achieving all it can be because a loophole within Section 401 is allowing a small handful of coastal states to dictate the future for all 40-plus states. That is unacceptable.

This point was absurdly exemplified last winter when a Russian tanker of liquified natural gas was sitting in the Boston Harbor providing for the Northeast U.S. – where pipeline development has been stalled – from losing its heat during last winter's Polar Vortex. Those needs could have been met safely and reliably with a steady supply of clean burning natural gas from Oklahoma. Imagine what that picture communicates to hard-working residents in my state? Do we really want our jobs and tax dollars to needlessly be given to Russia?

For that purpose, I support the actions taken by EPA and members of this committee to restore certainty to the Clean Water Act permitting process and certification under Section 401. A clear scope and a reasonable timeline are not invasive to states' rights. The current proposed rule, and the opportunity to strengthen it legislatively, does nothing to prevent Oklahoma's regulators from properly and scientifically considering whether a project negatively affects water quality in our state.

It has been almost 50 years since this regulation has been reviewed, and I support creating a reasonable baseline for Clean Water Act permitting and certification of interstate infrastructure, whether it be transmission line, pipeline or an interstate highway, to get Oklahoma's products to market.

Once again, I want to thank you for this wonderful opportunity to speak to you today and to highlight the great state of Oklahoma. I look forward to taking your questions.

STATE OF OKLAHOMA
OFFICE OF THE GOVERNOR

January 27, 2020

The Honorable John Barrasso
Chairman, U.S. Senate Environment and Public Works Committee
410 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Chairman Barrasso,

I was greatly honored to represent the Great State of Oklahoma before the United States Senate on the important issue of reforms of Section 401 of the Clean Water Act on November 19, 2019. Oklahoma values the importance of protecting public health and the environment while also encouraging economic development. I am proud that in Oklahoma we implement state and federal environmental regulations in a reasonable and common sense manner.

You posed a question for the record:

Chairman Barrasso:

1. At the hearing, Senator Gillibrand made the following statement.

"Governor Stitt, I just was offended by your statements that you know how to have good water in Oklahoma. I would just like unanimous consent to submit four articles for the record of how challenged your water quality actually is in Oklahoma, which I am sure you are aware. I am grateful that you have made progress in eliminating some contaminants, and that is a good thing, but it may be because you are starting from a worse-off place."

During the hearing, you had a brief opportunity to respond. Do you have anything further to add?

While this hearing was focused on Section 401 of the Clean Water Act, Senator Gillibrand of New York, criticized Oklahoma's implementation of the Safe Drinking Water Act and raised other drinking water concerns. It is important to note that the news articles are based on a federal data system with many known flaws, including inaccurate and incomplete data sets. States have continually raised concerns about this data for many years and some do not even use this system. We use either independently developed data systems or adapt the federal data system to capture the state information correctly and in a usable format. EPA has attempted to update, modify and expand its data system in recent years.

However, in mid-2019 EPA ceased work when even more problems were identified. Importantly, the Trump administration's leadership at EPA has requested for Oklahoma to serve on a governance committee to ensure that better data is available.

When discussing Public Water Supply compliance with the Safe Drinking Water Act, it is important to evaluate state specific data and criteria. Some states do not report data from drinking water systems that purchase water from another federally recognized drinking water system. Oklahoma believes that it is important to monitor public drinking water for all its citizens. While we recognize that Oklahoma and Texas have more violations of the Dis-infection Byproducts Rule than other areas of the country, it is important to understand why. During periods of drought, surface water quality changes and impacts treatment. It is also important to understand the difference in violations that cause immediate, acute health impacts and those that pose potential chronic health impacts. Bacteria contaminated drinking water is the greatest immediate health risk to the public. Importantly, Oklahoma has only had 18 mandatory boil orders and only two do-not-drink orders in the last two years out of approximately 1600 drinking water systems because of bacterial contamination.

Oklahoma drinking water systems have not experienced the catastrophic drinking water failures like Ohio[1], Michigan[2] and New Jersey[3]. We believe that drinking water systems must prioritize treatment and infrastrueture upgrades, and that the highest priority is on acute immediate health impacts such as adequate disinfection.

I am very proud of the actions taken by the Capacity Development Program in Oklahoma, in conjunction with the Oklahoma Rural Water Association, to improve the technical, managerial, and financial management of rural water systems. Through this effort our team has worked with drinking water systems to identify and complete leak detection and repairs in order to save small rural drinking water systems $1.2 million and 500 million gallons of water. These are critieal steps that ean improve compliance with complex federal regulations and make more money available for needed infrastructure upgrades. Additionally, work under this program lead to the Creek County Rural Water District #2 making substantial operational changes which improved compliance and led to them winning the Water for 2060 Excellence Award.[4]

Attacks on my State and our drinking water programs are both misleading and unwarranted. While every person and every organization can make improvements, I am very proud of our water systems. The City of Oklahoma City has twice won the American Water Works "Best of the Best Taste Test" contest.[5] Additionally, the Tahlequah Utility Authority in Tahlequah, Oklahoma won the National Rural Water Association "Great American Water Taste Test[6]." This is a testament to the ability of our public water supply systems to properly operate and maintain complianee.

Since the hearing was focused on the Clean Water Act Section 401 Water Quality Certification, I want to point out a few important facts that are germane. Oklahoma reviews and makes decisions on 401 Certifications on an average of 50 days. In the last two years we have approved 30 while only disapproving 7 due to insufficient information or determination that a Certification was not needed. Since 2016, Oklahoma has removed 358 water bodies from the 303(d) List of Impaired Water Bodies due to our improved water quality. Additionally, in order to protect our surface water bodies from contamination, Oklahoma, unlike the State of New York,[7] [8] and others, does not allow Combined Sewer Overflows of raw sewage mixed with stormwater into surface water bodies. This allows us to enjoy our outdoor way of life without the threat illness from human bacteria contamination.

Thank you for the opportunity to provide this additional information to the U.S. Senate Environment and Public Works Committee. If I can be of additional assistance please do not hesitate to contact me.

Sincerely,

J. Kevin Stitt
Governor of Oklahoma

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[1] https://abcnews.go.com/US/caused-toledos-water-contamination/story?id=24825275

[2] https://www.nrdc.org/stories/flint-water-crisis-everything-you-need-know

[3] https://www.epa.gov/nj/newark-drinking-water

[4] https://www.owrb.ok.gov/GWC/presentations/2019/2060excellenceawards.pdf

[5] https://www.watertechonline.com/home/article/15542323/oklahoma-city-water-utilities-trust-wins-annual-best-of-the-best-tap-water-taste-test

[6] https://nrwa.org/2019/02/oklahoma-town-wins-best-tasting-water-in-the-nation/

[7] https://www.riverkeeper.org/campaigns/stop-polluters/sewage-contamination/cso/

[8] https://data.ny.gov/Energy-Environment/Combined-Sewer-Overflows-CSOs-Beginning-2013/ephi-ffu6/data

Senator BARRASSO. Thank you very much, Governor.
Ms. Watson.

STATEMENT OF LAURA WATSON, SENIOR ASSISTANT ATTORNEY GENERAL AND DIVISION CHIEF, WASHINGTON STATE ATTORNEY GENERAL'S OFFICE

Ms. WATSON. Thank you Chairman Barrasso, Ranking Member Duckworth, and members of the Committee.

My name is Laura Watson. I am a Senior Assistant Attorney General of Washington State, and I am honored to be here today to talk about how important a State's role is in protecting against water pollution for all Americans.

Under the Clean Water Act of 1972, Congress empowered States and tribes to serve as co-regulators with the Federal Government. This includes longstanding State authority under Section 401 to ensure that federally permitted activities and projects don't harm State waters.

For the past 50 years, States have successfully implemented Section 401. For example, in the past half-century, Washington State has issued thousands of 401 certifications and approximately 30 denials. Only a few of these decisions have ever been appealed.

Though States have demonstrated a fair and successful implementation of Section 401, today Section 401 is on the chopping block.

First, EPA has proposed a rule that would seize control of 401 decisions from States and place those decisions in the hands of Federal agencies. EPA's proposed rule would drastically narrow the scope of 401 review. It would severely restrict the amount of time and information that States have to make their decisions, and it would grant Federal agencies veto authority over State decisions.

EPA's proposal crosses the legal line in many ways, which is why it is broadly opposed by States and tribes across the country and political spectrum.

South Dakota says that the rule is a poorly disguised effort by the Federal Government to severely limit State and tribal efforts to enforce water quality standards.

West Virginia says that the rule would undermine the authority originally provided to States in the Clean Water Act.

Arkansas says that allowing the Federal Government to override a State decision is by no means in the spirit of cooperative federalism.

Montana says that Montana's ability to protect water quality should not be weakened by Federal rulemaking.

The National Congress of American Indians says that the proposed rule impermissibly threatens Indian tribes' right to self-governance, and the Upper Snake River Tribes Foundation calls the rule a slap in the face of tribal sovereignty.

EPA's rule is only one concern that we face today. Senate Bill 1087 imposes some of the same problematic concepts in the rule and would further threaten to erode State rights. Both proposals run counter to the concept of cooperative federalism and the spirit and letter of the Clean Water Act, and both proposals would inevitably compromise clean water for families and communities across the Nation.

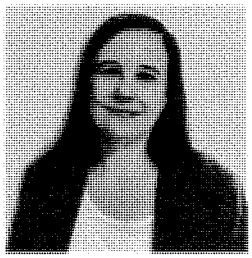
These extreme changes being proposed are both unfounded and unnecessary. They appear to be based on disagreement with a few State decisions, including Washington State's denial of a Section 401 certification for a proposed coal export facility on the Columbia River. That decision has been improperly cited as an abuse of authority, so I would like to set the record straight.

Washington's 401 denial was based on water quality grounds. Climate change and greenhouse gas considerations were in no way a factor in the State's denial. I understand that the denial decision will be made part of the record today, and you will see that my description of it is 100 percent accurate.

Rather than upending five decades of cooperative federalism and eroding the rights of every State and tribal government over a single 401 decision, we urge this Committee to recognize the important role that States and tribes play in protecting water quality, and to uphold the longstanding partnership we share under the Clean Water Act.

I thank you, and I look forward to your questions.

[The prepared statement of Ms. Watson follows:]



Laura Watson
Senior Assistant Attorney General and Division Chief
Washington State Attorney General's Office

Laura serves as a Senior Assistant Attorney General and Division Chief for the Washington State Attorney General's Office. She is the chief attorney for the Washington Department of Ecology and primary environmental law advisor to Governor Inslee and his staff. Prior to becoming a division chief, Laura served as a Deputy Solicitor General. She has handled hundreds of cases in state and federal courts. Laura is regularly invited to speak on her areas of expertise, including the Clean Water Act, the National Environmental Policy Act, and constitutional law.

Laura joined the Washington Attorney General's Office in 1998 and has had the good fortune to serve under three Attorneys General. In 2019, Attorney General Bob Ferguson presented Laura with an Attorney General Recognition Coin for her superior legal skills and service to the public. Former Attorney General Rob McKenna presented Laura with an Outstanding Leader award. Former Attorney General and Governor Christine Gregoire issued a Commendation to Laura for her work on a major Clean Water Act 401 case.

Laura graduated from the University of Washington School of Law with honors and received her bachelor's degree in philosophy from the University of Pittsburgh where she was a member of Phi Beta Kappa. She was born in Joliet, Illinois, and most of her extended family still lives in the Joliet area. Laura spent her formative years in Pittsburgh before she moved to Seattle for law school. She met her husband, a Boston native, while in law school and the two of them have made Washington their home. In her volunteer life, Laura serves as Vice President of Quixote Communities, an award-winning organization that provides permanent recovery housing for the homeless.

Testimony of Laura Watson
Senior Assistant Attorney General
Washington State Office of the Attorney General
Senate Committee on Environment and Public Works
November 19, 2019

Thank you Chairman Barrasso, Ranking Member Carper, and members of the Committee.

My name is Laura Watson. I am a Senior Assistant Attorney General of Washington State. I have worked on Clean Water Act and Section 401 issues throughout most of my twenty-plus year career with the Washington Attorney General's Office. It is an honor to be here today to discuss the important topics before us, both of which stand to have a drastic impact on water quality in the United States.

When Congress enacted the Clean Water Act in 1972, it clearly intended to preserve the states' leading role in addressing water pollution. For its nearly 50-year history, the Environmental Protection Agency (EPA) and federal agencies under administrations of both parties have respected this "policy of Congress to recognize, preserve, and protect the primary responsibilities of states" to prevent water pollution within state borders.[1] The resulting model of cooperative federalism spawned a strong state, federal, and tribal partnership that has allowed the partners to work together towards the common goal of protecting our nation's waters. Unfortunately, an extreme new rule proposed by EPA and the harmful legislation before us today would effectively rewrite Section 401 of the Clean Water Act and undermine these decades of partnership.

States have successfully implemented Section 401 for the past 50 years. Section 401 allows states to grant, condition, or deny water quality certifications for federally permitted activities within state borders. Most applications for 401 certifications are granted. Some applications are granted with conditions, while a small handful are denied. For example, over the past half century, Washington State has issued thousands of 401 certifications, hundreds of certifications with conditions, and approximately 30 denials. Only a few of these decisions have been appealed. In short, Washington State demonstrates a record of success and implementation of a fair process in making Section 401 certification decisions.

Section 401 is not broken. Rather, it is an effective and important tool to ensure that federally permitted activities do not cause water pollution.

Now, Section 401 is under attack in two ways. First, EPA has proposed a rule that would seize control of 401 decisions from states and place those decisions in the hands of federal agencies. Second, legislation has been introduced — the Water Quality Certification Improvement Act — that would similarly erode states' rights in an attempt

[1] 33 U.S.C. § 1251(b).

to benefit special interests. These two proposals run counter to the concept of cooperative federalism and the spirit and letter of the Clean Water Act, and would inevitably compromise clean water for families and communities.

EPA's Proposed 401 Rules Are an Assault on the Cooperative Federalism Model Established by Congress in the Clean Water Act Almost 50 Years Ago

The potential harms posed by EPA's proposed rule cannot be overstated. It would exempt pollution and some projects altogether from state oversight. And it would shift decision-making authority to federal agencies, seriously undermining the cooperative federalism embodied in the Clean Water Act.

If finalized, EPA's proposed rule would:

- dramatically narrow the scope of 401 review;
- severely restrict the amount of time states have to make 401 decisions;
- eliminate states' ability to receive full information prior to making decisions; and
- grant federal agencies ultimate veto authority over state decisions.

This proposal crosses the legal line in several ways, four of which I will highlight today. First, EPA is attempting to operate in a vacuum, ignoring court precedent. The Supreme Court has already interpreted the scope of Section 401 in the seminal case, *PUD No. 1 of Jefferson County*.[2] There, the Court confirmed that states may protect water quality by imposing 401 conditions on the federally permitted activity as a whole, not just on specific point source discharges. EPA proposes to reverse this Supreme Court precedent by redefining the scope of 401 to encompass only point source discharges. But just as EPA cannot ignore the laws written by Congress, so too does EPA lack the authority to reverse Supreme Court decisions interpreting those laws.

Second, the Supreme Court and appellate courts across the nation have confirmed that Section 401 specifically empowers states — not the federal government — to condition or deny projects that would harm water quality.[3] In 1972, Congress granted this authority to states, not to federal agencies. But EPA's proposal would allow a federal agency to ignore conditions that a state includes in a 401 certification and even override a state's 401 denial if the federal agency believes that the state acted outside of its authority. In other words, states would be permitted to exercise 401 authority only if federal agencies agree with the way that authority is exercised. This effectively invalidates 401 and eliminates any semblance of cooperative federalism.

Third, nothing in the law authorizes EPA or other federal agencies to establish deadlines for state action under Section 401. The statute has already established a deadline: states have "a reasonable period of time" of "up to one year" to make their decisions. The vast majority of 401 decisions are made on much shorter timeframes than a year. Bigger and more complicated projects might require more time. But it is not up to EPA to dictate to states what that timeframe should be. Rather, states are free to work within the

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[2] *PUD No. 1 of Jefferson County v. Wash. Dep't of Ecology*, 511 U.S. 700 (1994).
[3] *See. e.g., S.D. Warren Co. v. Maine Bd. of Envtl. Protections*, 547 U.S. 370, 380 (2006).

parameters set in statute, including issuing their decisions "within a reasonable period of time" of "up to one year."

Fourth, EPA doesn't have the authority to arbitrarily limit the information that a state can consider in making 401 decisions. Yet that is exactly what EPA proposes to do by including a short list of seven largely non-substantive items that starts the 401 clock. This perfunctory list includes administrative rather than substantive information, such as the name and address of the applicant and a statement that the applicant seeks a 401 certification. Under EPA's proposal, states would not be given more time to obtain additional information that might be needed if, for example, the scope of the project substantially changes after the 401 request is submitted or if the initial request fails to correctly identify the number, location, or nature of potential discharges into water.

Taken together, it is plainly evident that EPA's interest is not in protecting water, as the Clean Water Act requires. Rather, EPA wants to gift industry a process that is so "streamlined" as to be virtually useless. This is not what is envisioned by Section 401.

States Across the Nation Are Troubled by EPA's Power Grab

In light of the breathtaking scope of EPA's proposal, it should come as no surprise that states across the country and across the political spectrum have expressed opposition to the proposed rules. For example, the Department of Environment and Natural Resources in South Dakota calls EPA's proposed rule "a poorly disguised effort by the federal government to severely limit the states' and tribes' efforts to enforce their water quality standards and to impose appropriate conditions on federally-issued permits." Thus, "South Dakota opposes almost all aspects of this rule . . . . States and tribes are integral partners under the Clean Water Act. Section 401 certification is not an authority that EPA can give or take away."[4]

The Arkansas Game and Fish Commission notes that "[a]llowing the federal government to override a state decision is by no means in the spirit of cooperative federalism . . . . This proposed rule will transfer decision making authority from the state to the federal permitting and licensing agencies who may be ill equipped to address state specific water quality issues."[5]

The West Virginia Department of Environmental Protection expresses its concern that "[t]hrough the implementation of the proposed rule, state rights to protect resources from degradation and to plan the development and use of land and water resources

[4] Secretary Hunter Roberts, South Dakota Dep't of Environment and Natural Resources. October 21, 2019. Comment Letter to EPA Administrator Wheeler. https://www.regulations.gov/document?D=EPA-HQ-OW-2019-0405-0951.

[5] Director Pat Fitts, Arkansas Game and Fish Commission. October 21, 2019. Comment Letter to EPA Administrator Wheeler. https://www.regulations.gov/document?D=EPA-HQ-OW-2019-0405-0880.

would be reduced." This "would undermine the authority originally provided to states in the CWA."[6]

Montana worries that "the proposed 401 certification rules could significantly constrain Montana's ability to protect our water quality under section 401 of the Clean Water Act. This would undermine the principle and practice of cooperative federalism, which is the core of section 401 . . . . Montana's ability to protect our water quality should not be weakened by federal rulemaking."[7]

The Louisiana Department of Environmental Protection points out that the "proposed rule redefines the scope of state authority and usurps the state's authority to include conditions in certifications based on state law." The proposed rule "essentially allows the federal agency to override additional conditions or denials, shorten the 'reasonable time period' at will, and limit the certifying agency's ability to request additional information from the applicant." And Louisiana expresses concern about the rule's potentially devastating impact on water quality: "***Although EPA's goal is to reduce undue burden on interstate commerce and infrastructure projects, the rule language will limit the state's ability to regulate small projects with potentially severe, localized impacts to water quality.***"[8]

The Utah Department of Environmental Quality expresses similar concerns in noting that "many aspects of the proposed rule are inconsistent with the goal of cooperative federalism." Utah recognizes that "[s]tate authority to certify and conditional federal permits of discharges under the CWA is vital to the CWA's system of cooperative federalism[.]" Contrary to cooperative federalism, EPA's proposed rule is "an inappropriate transfer of authority from the state to federal agencies."[9]

Wyoming Governor Gordon states: "Neither the EPA nor a federal permitting or licensing agency has the authority to directly overturn a state's certification denial. The final determination on whether the state certification denial is within the scope of water quality certification is properly decided through state judicial procedures."[10]

These states' concerns are echoed by my own state's Department of Ecology. Ecology Director Maia Bellon notes that "EPA's proposal amounts to no less than a rewrite of

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[6] Acting Director Katheryn Emery, West Virginia Dep't of Environmental Protection. October 21, 2019. Comment Letter to EPA Administrator Wheeler. https://www.regulations.gov/document?D=EPA-HQ-OW-2019-0405-0805.

[7] Director Shaun McGrath, Montana Dep't of Environmental Quality. October 17, 2019. Comment Letter to EPA Administrator Wheeler. https://www.regulations.gov/document?D=EPA-HQ-OW-2019-0405-0277.

[8] Assistant Secretary Elliott B. Vega, Louisiana Dep't of Environmental Quality. October 19, 2019. Comment Letter to EPA Office of Water. https://www.regulations.gov/document?D=EPA-HQ-OW-2019-0405-0898.

[9] Executive Director L. Scott Baird, Utah Dep't of Environmental Quality, October 21, 2019. Comment Letter to EPA Administrator Wheeler. https://www.regulations.gov/document?D=EPA-HQ-OW-2019-0405-0907.

[10] Governor Mark Gordon, State of Wyoming. October 21, 2019. Comment Letter to EPA Administrator Wheeler. https://www.regulations.gov/document?D=EPA-HQ-OW-2019-0405-0817.

this important law that for decades has enabled states to protect and enhance water bodies within our borders . . . . If finalized, the rule would significantly hinder states' ability and authority to manage and protect the water our residents need for drinking, fishing, and recreation."[11]

It is not just individual states that are concerned by EPA's astounding overreach. A dozen national and regional organizations, led by the Western Governors Association, joined a letter to express "numerous concerns about the substantial effects the proposed rule would have on states' authority and autonomy to manage and protect water resources and to implement Clean Water Act Section 401." These organizations, representative of the full political spectrum, worry that "[a]dministratively curtailing states' historic and well-established authority under CWA Section 401 would inflict serious harm to the cooperative federalism model established by Congress under the CWA and the fundamental constitutional authority of states over water resources within their boundaries."[12]

A coalition of 23 Attorneys General, led by Washington, New York, and California, had this to say: "Every provision of the proposed rule appears designed to curtail state authority under section 401." Section 401 is intended to give states broad authority to prevent water pollution. "But now, called to action by an Executive Order designed to promote energy infrastructure rather than protect water quality, EPA proposes an interpretation of section 401 that is inconsistent with the Clean Water Act and would unlawfully usurp state authority to protect the quality of water within our borders." EPA has cited no legitimate reason for its unprecedented federal overreach: "Given the numerous flaws of the proposed rule and the lack of evidence that existing section 401 regulations and procedures are inadequate, EPA should abandon its current effort and should withdraw the proposed rule."[13]

This chorus of criticism by red and blue states alike makes two things clear. First, the intent of EPA's proposal is *not* to protect water quality. Rather, EPA seeks to weaken clean water protections at the behest of a few industry interests. Second, EPA is willing to upend the cooperative federalism embodied in the Clean Water Act in order to appease these same industry interests. Washingtonians and people across the nation who rely on clean water for drinking, fishing, swimming, and recreating deserve better than this.

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[11] Director Maia Bellon, Washington Dep't of Ecology. October 21, 2019. Comment Letter to EPA Administrator Wheeler. https://www.regulations.gov/document?D=EPA-HQ-OW-2019-0405-0931.
[12] Western Governors' Ass'n, et al. October 16, 2019. Comment Letter to EPA Administrator Wheeler. https://www.regulations.gov/document?D=EPA-HQ-OW-2019-0405-0728. In addition to the Western Governors Association, the letter was joined by the National Conference of State Legislatures, National Association of Counties, National League of Cities, United States Conference of Mayors, Council of State Governments, Council of State Governments West, Western Interstate Region, Association of Clean Water Administrators, Association of State Floodplain Managers, Association of State Wetland Managers, and Western States Water Council.
[13] Attorney General Bob Ferguson, et al. October 21, 2019. Comment Letter to EPA Office of Water. https://www.regulations.gov/document?D=EPA-HQ-OW-2019-0405-0556.

EPA's Proposal Is Also Broadly Opposed by Native American Tribes

Washington's 29 federally recognized Indian Tribes are integral partners in the protection of water quality. Across the nation, 45 tribes have "treatment as state" (TAS) status under the Clean Water Act, which allows them to establish their own water quality standards and issue 401 certifications for federally permitted projects within tribal jurisdiction. Non-TAS tribes share their valuable expertise with state environmental agencies to ensure that tribal rights and values are protected in the 401 process. These tribal rights, including treaty rights, are now at risk, prompting several tribes and tribal organizations to strongly oppose EPA's federal overreach.

The Columbia River Inter-Tribal Fish Commission,[14] based in the Pacific Northwest, aptly summarizes the concerns: "The Proposed Rule substantially restricts and diminishes the scope of state and TAS tribes' 401 authority by prohibiting them from considering the complete impact while granting federal permitting agencies a new authority to overturn conditions and denials. These conditions are counter to the intent of cooperative federalism that is essential to the CWA as Congress intended." The Commission notes that recent concerns around 401 certifications were generated by a few recent 401 denials, "but these few denials do not suggest a broken program. In fact, the CWA, and specifically section 401, was designed by Congress to protect water quality first." In sum, "[t]he Proposed Rule largely violates the CWA, will have adverse and wide-ranging consequences beyond the purported impetus for these changes, and will not fix the purported problems EPA aims to solve."[15]

The Upper Snake River Tribes Foundation[16] states that EPA's proposal "is a slap in the face of tribal sovereignty." The proposal "undermines EPA's professed goal of recognizing principles of cooperative federalism." The Foundation concludes that "[t]he proposed revisions weaken EPA's implementation of the relevant provisions of Section 401 and are not consistent with fundamental objectives to protect human health and the environment, its statutory responsibilities under the Clean Water Act, its responsibility to protect critical tribal trust resources, its consultation responsibilities, and adherence to the key principles of EPA's 2010 § 401 guidance."[17]

The National Congress of American Indians remarks that "the proposed revisions to section 401 of the Clean Water Act would dramatically reduce protections for tribal waters and water-dependent resources." The proposed rule "impermissibly threatens Indian Tribes' right to self-governance." And the National Congress, like other tribal associations, points out that EPA has failed in its responsibility to consult with tribes

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[14] The Commission consists of Columbia River fishing tribes in Washington, Oregon, and Idaho.
[15] Executive Director Jaime A. Pinkham, Columbia River Inter-Tribal Fish Comm'n. October 21, 2019. Comment Letter to EPA Office of Water. https://www.regulations.gov/document?D=EPA-HQ-OW-2019-0405-0992.
[16] The Foundation consists of Snake River Basin tribes in Nevada, Idaho, and Oregon.
[17] Executive Director Scott Hauser, Upper Snake River Tribes Foundation. October 21, 2019. Comment Letter to EPA Office of Water. https://www.regulations.gov/document?D=EPA-HQ-OW-2019-0405-0876.

before moving forward: "Despite the sweeping restrictions in the proposed rule, the EPA has not fulfilled its obligation to engage in meaningful tribal consultation."[18]

EPA stubbornly persists on a path opposed by states and tribes alike. This is not the path envisioned by Congress when it declared a policy of recognizing, preserving, and protecting the primary responsibilities of states to prevent water pollution.

Every Senator should be concerned by this blatant disregard for the law and Congress' intent in writing it. It is incumbent on Congress to reassert its constitutional authority in the face of federal executive overreach, demand that EPA immediately cease its misguided endeavor, and empower states and tribes to carry out the functions reserved for them by Congress in the Clean Water Act.

The Water Quality Certification Improvement Act Is Equally Ambitious in Curtailing States' Rights and Weakening Protections Against Dirty Water

Unfortunately, the Water Quality Certification Improvement Act (S. 1087) imposes some of the same concepts as EPA's rule that cause significant concern for states and tribes. First, the bill would abandon *PUD No. 1* and 50 years of successful 401 implementation by restricting the scope of 401 review to "discharges" into the "navigable waters." States and tribes would no longer be able to consider and address all sources of water pollution arising from a federally permitted activity. The inevitable result would be more water pollution — in every state, from Washington to Wyoming.

In their comments to EPA, several states explained why a narrowed scope of review is unacceptable. For example, as noted by West Virginia's Department of Environmental Protection, "Redefining the term discharge to relate only to a point source and disallowing the review of the full project raises significant concern[.]"[19] The Montana Department of Environmental Quality notes that "there is not always a defined discharge or discrete pipe like in a point source. Montana prefers the 'activity as a whole' alternative."[20]

The Washington State Ecology Director remarks that limiting 401 review to specific discharges "would not only dramatically narrow the scope of what we can review within a specific project, it would exempt some projects from review altogether." This narrowed scope of review "could drastically impact Washington's endangered and threatened species, including the southern resident Orca and numerous salmonid species."[21]

The Chairman's Water Quality Certification Improvement Act would infringe on state authority in a second fundamental way. Currently, Section 401 allows states to make their 401 decisions based not only on federal water quality requirements but also based

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[18] National Congress of American Indians. October 21, 2019. Letter to EPA Administrator Wheeler. https://www.regulations.gov/document?D=EPA-HQ-OW-2019-0405-0965.
[19] *Supra* note 6.
[20] *Supra* note 7.
[21] *Supra* note 11.

on other appropriate requirements of state law, such as instream flow conditions to protect fish.

Yet this legislation would eliminate states' ability to apply state water quality requirements to 401 decisions and would allow states to consider only a short list of federal requirements. As a result, several water pollution prevention measures would be on the chopping block — including measures related to erosion and sedimentation standards, construction and post-construction stormwater management, coastal protections, groundwater protections, and state laws protecting threatened and endangered species.

Each of these requirements directly relates to water quality. For example, construction stormwater management ensures that a wide variety of contaminants unearthed during the construction process and carried in stormwater do not enter the receiving water body. Sedimentation standards address similar concerns. If the Chairman's legislation were to become law, states would no longer be able to implement these critical pollution prevention measures as a condition of 401 certification.

Prohibiting states from applying their own water quality requirements contradicts the letter and the spirit of Section 510 of the Clean Water Act.[22] Section 510 recognizes that the Clean Water Act sets the floor of water quality protection and that states are free to regulate above the federal floor: "nothing in [the Act] shall . . . preclude or deny the right of any State or political subdivision thereof or interstate agency to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution."

Section 401 gives teeth to Section 510's express intent to preserve states' traditional authority over water pollution. Courts have understood sections 401 and 510 as demonstrating a clear intent not to preempt but to "supplement and amplify" existing state authority.[23] Under Section 401, the federal government itself is powerless to preempt more restrictive state standards, even when it comes to federal permitting and licensing decisions. The Chairman's legislation would transfer that traditional state power to federal agencies, like the Environmental Protection Agency and the Federal Energy Regulatory Commission, robbing the states of their power and harming water quality.

When this bill was first introduced in 2018, a broad coalition of governmental organizations, led by the Western Governors' Association, wrote a letter to "urge Congress to reject any legislative or administrative effort that would diminish, impair or subordinate states' ability to manage or protect water quality within their boundaries." The letter recognized that Section 401 is a "vital component of the CWA's system of cooperative federalism" and that 401 authority helps "ensure that activities associated with federally permitted discharges will not impair state water quality." Any effort to

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[22] 33 U.S.C. § 1370.
[23] *See, e.g., People of State of Ill. ex rel. Scott v. City of Milwaukee*, 366 F. Supp. 298, 301–02 (N.D. Ill. 1973).

streamline the 401 process "must recognize, and defer to, states' sovereign authority over the management and allocation of their water resources."[24]

The Utah Department of Environmental Quality points out that "Utah is in the best position to protect the unique waters within our boundaries" and that "Utah's state water quality laws are designed to protect the unique aspects of [state] waters." For that reason, "state management is preferable to a federally mandated one-size-fits-all approach to water management and protection that does not accommodate the practical realities of geographic and hydrologic diversity among states."[25]

There is no question the Water Quality Certification Improvement Act infringes on state and tribal sovereignty and sacrifices clean water under the guise of process improvements. Washington State supports streamlining federal and state processes in a responsible and transparent manner, and we are always willing to assist in good faith efforts to make the process work better. However, Section 401 is not a problem that needs to be fixed. It is working as effectively today as it has over the past five decades. We urge you not to dismantle this important tool for preventing water pollution.

Washington State Did Not Deny a Section 401 Certification on Non-Water-Quality Grounds

As this Committee knows, in September 2017, the Washington State Department of Ecology denied a Section 401 certification for a proposed coal export terminal on the Columbia River. This decision has been improperly cited as an "abuse of authority" and "hijacking" of the 401 process by the Chairman. Because the facts underlying the decision continue to be mischaracterized, I would like to set the record straight today.

We have sent a copy of the decision to the Chairman and Ranking Member, and I understand it will be inserted into the record for today's hearing. The decision speaks for itself and should dispel any notion that Washington's 401 denial was not based on water quality grounds. Pages 13–18 of the decision describe in detail the numerous water quality concerns posed by the project. For example, over 30 acres of wetlands would have been destroyed by this project. The project would have required dredging of 41 acres of Columbia River bed and would have produced contaminated stormwater from stockpiling 1.5 million tons of material onsite. The company had the opportunity but failed to come forward with sufficient information to demonstrate how these water quality impacts would be avoided or mitigated.

This is not the first time that the company failed to provide requested information to regulators. In fact, it was discovered that the company intentionally and deceptively concealed information about the scope and size of its project in order to evade full

[24] The organizations joining the Western Governors' Association are the Association of Clean Water Administrators; Association of Fish and Wildlife Agencies; Association of Wetland Managers; Conference of Western Attorneys General; Council of State Governments; West Council of State Governments; Western Interstate Region; Western Interstate Energy Board; and Western States Water Council.
[25] *Supra* note 9.

environmental review.[26] In another instance, the company refused to provide requested financial information to the Washington State Department of Natural Resources despite seeking a sub-lease from the Department to construct its terminal on state-owned aquatic lands. This resulted in a denial of the sub-lease, which was recently upheld by the Washington State Court of Appeals.[27]

There have been false claims that the Section 401 water quality certification denial was based on climate change impacts linked to concerns about coal as a product. Again, the decision speaks for itself. Climate change considerations were not a factor in the state's denial.

The truth is that this was an enormous industrial proposal that would have had significant adverse environmental impacts, as shown by the unchallenged environmental impact statement. If constructed, this terminal would not only have been the biggest thermal coal export terminal in all of North America, but would also have exported more tons of dry bulk commodities than all of the existing marine terminals in Washington (and Oregon on the Columbia River) *combined.*

Faced with these significant adverse environmental impacts, Cowlitz County independently denied land use permits under the state Shoreline Management Act that would have been necessary for the project to proceed.[28] I cannot emphasize enough the significance of this. That the local government denied land use permits independent of the state's decision means all the brouhaha over the 401 denial — from the project sponsors, EPA, the Chairman of this Committee — is much ado about nothing. Even if the Washington Department of Ecology changed its mind and issued a 401 certification tomorrow, the project *still* could not be built because it lacks a sub-lease and necessary land use permits.[29] In other words, the 401 denial is effectively moot.

Contrary to the rhetoric, permit denials for this project are not a referendum on coal. There is no anti-coal conspiracy. Rather, the decisions reflect the thoughtful and thorough decision-making process that Washingtonians have a right to expect of their public servants.

It seems only fair that we should expect the same from this Committee and from EPA. Rather than upending five decades of cooperative federalism and eroding the rights of every state and tribal government over one or two permitting denials, we urge this Committee to recognize the important role states and tribes play in protecting water quality, and to uphold the longstanding partnership we share under the Clean Water Act.

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[26] *Northwest Alloys, Inc. v. Dep't of Natural Resources*, 447 P.3d 620, 624 (Wash. App. 2019).
[27] *Northwest Alloys*, 447 P.2d at 632.
[28] Wash. Rev. Code ch. 90.58.
[29] *In re the Matter of Millennium Bulk Terminals-Longview LLC Coal Export Facility*, File No. 12-04-0375. Findings of Fact, Conclusions of Law, and Decision Denying Permits (Nov. 13, 2017). http://www.co.cowlitz.wa.us/2204/Hearing-Examiner.

Congress and EPA Should Not Eliminate the Authority of 50 States Over One or Two Decisions They Disagree With

In Washington, we have become accustomed to being targets of the rhetoric used to justify the undoing of Section 401, but I feel compelled to tell this Committee — in no uncertain terms — the extreme changes being proposed to Section 401 are unfounded and unnecessary; they run counter to congressional intent and the concept of cooperative federalism; and they carry grave risks to clean water for families in every state.

As I have demonstrated today, the coal export terminal in Washington was properly and lawfully denied by the state Department of Ecology. Every tribunal that has thus far reviewed Washington's decision has upheld it. Although the 401 denial is still in the process of being litigated, we have full confidence that the decision will be upheld at the end of the day. And even if the 401 certification had been granted, the project in question would still not have moved forward due to other, independent denials.

New York has also been a target of these attacks, based on the denial of three Section 401 certifications by that state's Department of Environmental Conservation. But these denials represent a miniscule percentage of the 4,000-plus water quality certifications received and processed in a noncontroversial manner by the Department each year. Moreover, each of the denials were based on the project proponent's failure to demonstrate compliance with water quality standards.[30]

Allegations of improper motive by both states are unfounded, and judicial review has been a sufficient safeguard in the small handful of cases in which an applicant disagrees with a state's decision.

The Clean Water Act entrusts states with the responsibility of protecting water by denying or conditioning projects that will degrade water quality. Individual states and clean water administrators — across the country and political spectrum — have objected to the drastic changes embodied in EPA's rule and the Water Quality Certification Improvement Act because it will strip states of their authority to do this work.

We cannot afford to throw away Clean Water Act protections for millions of Americans over a couple denials. Clean water for our communities is at stake.

Thank you, and I look forward to answering your questions.

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[30] New York Office of the Attorney General. August 15, 2018. Letter to Senator Gillibrand. See page 16 at https://www.govinfo.gov/content/pkg/CHRG-115shrg31623/pdf/CHRG-115shrg31623.pdf.

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December 30, 2019

The Honorable John Barrasso
Chairman
Committee on Environment and Public Works
United States Senate
410 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable Thomas R. Carper
Ranking Member
Committee on Environment and Public Works
United States Senate
410 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Chairman Barrasso and Ranking Member Carper:

Thank you for the opportunity to provide testimony before the Senate Committee on Environment and Public Works on November 19, 2019, regarding the critical importance of upholding Section 401 of the Clean Water Act. As I stated in my testimony, Section 401 water quality certifications are an important tool for states to be able to fulfill their duty under the Clean Water Act to protect their waters against pollution. Any action that threatens state authority also threatens clean water for millions of Americans—in Washington and across the country—who rely on states to serve as the front line of water quality protection.

I appreciate the oppo l iunity to answer the following questions submitted by you and members of the Committee on how S. 1087 and EPA rulemaking impacts our ability to protect clean water in Washington State. Please see my responses below.

Senator Carper:

1. **Many states have designated certain waters as quote "outstanding resources" or "scenic rivers." For example, in Wyoming, these are waters like the main stems of the Snake River, the Green River, the North Platte River, and over a dozen others. Oklahoma similarly has about three-dozen "outstanding" waters, most of them tributaries of the Arkansas River or the Lower Red River.**

Should states be allowed to consider whether a federally permitted activity would violate *water quality* standards for those waters?

What effect would S. 1087 have on Washington State's ability to protect these especially valuable and vulnerable waters?

Yes. The health of our state's waters, including those designated as "outstanding resources" or "scenic rivers," is vital to our state's agricultural and manufacturing economies, central to our energy production, relied on by Washington's 29 federally recognized Native American tribes, and critically important for our state's tribal, commercial, and sports fishers. Washingtonians treasure our clean waters and the recreational, economic, and cultural values supported by a healthy and clean environment. Each state is unique and needs the flexibility and authority to address their individual water needs as they balance growth and development, as well as proper environmental management. State regulators are in the best position to manage the waters within their borders because of their on-the-ground knowledge of the unique aspects of their hydrology, geology, and legal frameworks.

All waters deserve the full protection of the law to ensure that activities associated with federally permitted discharges will not impair water quality. Section 401 has provided protection to these waters for nearly 50 years. Section 401 is not broken and does not need to be fixed. Rather, it is an effective and important tool to prevent water pollution from federally permitted activities.

Washington has more than 70,000 miles of rivers, of which nearly 200 miles are designated as wild and scenic *(see* U.S. Fish and Wildlife Service, *National Wild & Scenic Rivers System,* https://www.rivers.gov/washington.php). S. 1087 would severely limit the state's ability to protect these waters from federally permitted activities. For example, bank stabilization projects and levy maintenance projects, which can cause significant water pollution, could be exempt from state review under S. 1087 if the pollution from such projects is not narrowly classified as a point source discharge into navigable waters. Furthermore, S. 1087 would exempt pollution and some other projects altogether from state oversight, allowing discharges into waters that states have worked hard to keep clean for safe drinking water and public health.

Finally, S. 1087 would limit states' abilities to implement several water pollution prevention measures, including measures related to erosion and sedimentation standards, construction and post-construction stormwater management, coastal protections, groundwater protections, and state laws protecting threatened and endangered species.

Senator Merkley:

2. **During the hearing, you provided some information about challenges with the State of Washington's review of the Millennium Coal Terminal project for purposes of Clean Water Act Section 401 water quality certification, including limited information submitted to the state, and lack of sufficient responses for additional information, such as how the company was going to mitigate against water quality impacts. These can make it very difficult for a state to complete 401 certification reviews, as we've also observed in Oregon.**

    a. **In your experience, are there ways that the 401 review process can be improved?**
    b. **Please provide examples of action that can be taken by both those applying for permits and by regulators providing certification.**

Washington State supports efficiencies in the water quality certifications process that fit within the existing 401 framework. Unlike the current EPA, we understand that improvements can be made to implementation of the Clean Water Act without gutting state authority or dirtying our waters. To that end, the state would support streamlining federal and state processes in a responsible and transparent manner to provide the best service possible to applicants and fulfill the state's obligation to protect clean water for all residents.

On February 20, 2019, the Western Governors' Association (WGA), which represents 22 states and territories including the State of Washington, sent a letter to EPA with process improvements that would be acceptable to states. Washington agrees with several of those recommendations, including the recommendation to "encourage, facilitate and support the development by states of their own best practices for implementation of CWA Section 401 state water quality certification programs, and encourage federal participation in such development."

Our state would also support the following actions by applicants to streamline the process:

- Early coordination with tribes, local government and other state agencies.
- Submission of a complete application with a clear proposal and supporting documents. If there are impacts that need to be mitigated, submit the mitigation documents as part of the application.
- Ensure that state agencies receive the same information package and updates as the federal agency and vice versa.
- Provide requested information in a timely manner. In addition, get clarification quickly if requests are unclear.

Additionally, Washington would support the following actions taken by states and regulators:

- Work with the federal agencies to ensure that information requested as part of a Section 401 can also be used by the federal agency.
- Provide information on how the Section 401 process works and be available to answer questions.
- Provide feedback on the application package and identify needed information.
- Coordinate with federal agencies, tribes, local governments and other state agencies.

Again, thank you for the opportunity to testify on behalf of the State of Washington on this important issue. If you have any further questions, please do not hesitate to contact me.

LAURA J. WATSON
Senior Assistant Attorney General
360-586-6770

LJW/DEF
By e-mail

Senator BARRASSO. Thank you very much Ms. Watson.

Thank you for the testimony of all of you.

We will now start with rounds of questioning, and I would like to start with Governor Gordon.

The Washington blockade of coal exports prevents millions of tons of Wyoming coal from reaching foreign markets. I am going to, without objection, enter into the record a letter in support of today's hearing from the National Mining Association.

[The referenced information follows:]

RICH NOLAN
President & CEO

November 18, 2019

The Honorable John Barrasso
Chairman
Senate Committee on Environment
and Public Works
410 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable Tom Carper
Ranking Member
Senate Committee on Environment
and Public Works
456 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Chairman Barrasso and Ranking Member Carper:

The National Mining Association (NMA) strongly supports S. 1087, the Water Quality Certification Improvement Act of 2019. The legislation will bring much needed clarity and transparency to the 401 process, while preserving the central role of states in protecting local waterways. Clean Water Act Section 401 water quality certifications are an important component of mine permitting and of key infrastructure development upon which the mining industry relies.

The purpose of Section 401 is to ensure the application of rigorous water quality requirements to federally permitted activities. While many states act in good faith, certain coastal states have misused the process to block projects for political reasons that have nothing to do with water quality concerns. These states have thwarted Congressional intent by hijacking the 401 certification process as a means to interfere with international trade policy in violation of the Commerce Clause of the U.S. Constitution.

Critics argue that any changes made to the 401 process will curtail states' rights to regulate their own waterways. That is an overstatement. Rather, the changes outlined in this legislation simply will modernize the 401 process by providing clarity for project proponents on timelines and the appropriate scope of review for their federal permits. States still will have the authority and ability to review, accept, and deny permits, but must do so in a way that adheres to certain processes and timelines. NMA members have faced significant challenges when permitting authorities did not make decisions within a "reasonable timeframe" not to exceed one year, as the law requires. Instead, decisions on permit applications have dragged out for many years, putting projects in

jeopardy. Certifying authorities have paused the timeline and, in some instances, even restarted the clock by forcing project proponents to withdraw an application then reapply. This legislation will set appropriate procedural guardrails and requirements on states so they process requests for certification in a way that is more clear and transparent for our members, other project proponents, and the public.

This abuse of the 401 process contradicts congressional intent in passing the Clean Water Act and years of Supreme Court precedent interpreting the Commerce Clause of the U.S. Constitution. States that abuse the 401 process for political purposes stifle the U.S. economy by preventing international trade and thwart the creation of good-paying jobs across the U.S. As an example, West Coast states have used the process to block the export of coal from the Powder River Basin and various western states, the type of coal preferred for high efficiency, low emission power plants that are in operation and being built around the world. The ability for U.S. coal producers to serve fast-growing Asian markets is hindered by the inability to gain state approval to build state of the art coal export facilities on the West Coast. In 2018, 115 million short tons of U.S. coal were exported, and the demand for coal worldwide continues to grow.

Coal export facilities on the West Coast would be substantial economic boons not only to the states in which they are located, but also to states, tribal and local communities across the country that produce and transport the coal. For every million tons of coal exported, an estimated 1,320 jobs are created. Expenditures on downstream transportation services related to coal exports support thousands of other jobs.

Today West Coast states misuse the 401 process to block coal projects. But if allowed to continue, these or other states could block the export or import of any other good or service with which they disagree politically. The 401 process was intended to give states a role in protecting their own water quality, not to be used as a political stunt. It is important that Congress sets the record straight now. The Water Quality Certification Improvement Act of 2019 ensures that water quality certifications focus on their intended environmental purpose – the protection of local waterbodies potentially impacted by federally licensed activities – and will therefore help promote U.S. trading power while protecting the health of local communities.

Sincerely,

Rich Nolan

Senator BARRASSO. Governor Gordon, the Association explains that "For every million tons of coal exported, an estimated 1,320 jobs are created." So I would like to ask, how is Washington State's abuse of the certification process hurting Wyoming workers and harming the economy of our home State?

Mr. GORDON. Thank you, Mr. Chairman. Washington's blockade has brought a certain amount of uncertainty to coal markets going forward unjustifiably. In Wyoming, we have seen this year in the coal markets, with the work that has been done nationwide, including Washington, several bankruptcies of Westmoreland Coal, Arch, Peabody, Cloud Peak, Blackjewel, with attendant pension challenges, healthcare challenges.

We had 350 workers that were out of work in Gillette as of July 1st when Blackjewel went down. Our State has had to respond dramatically to that to make sure that people found new jobs, to work with companies to try to find a placement for that and also to handle some of the challenges with healthcare.

That is not exclusive to Wyoming. The coal strip also has seen losses of jobs and population, and it is a dramatic loss to the State's revenues.

Let me just say, too, Mr. Chairman, that we do it better. We have the strongest environmental laws in the world. We require the best working conditions in the world. The coal is going to be burned overseas regardless. Washington's own documentation indicated that, as far as global warming is concerned, that the work that was done to get our coal to market would actually reduce carbon emissions over time.

I just want to make that point once again. We have strong environmental and labor conditions here. Our mining is done better under better reclamation standards and fully bonded, so I think generally speaking it is problematic to have that, what we have seen with the losses of jobs.

Senator BARRASSO. So the State of Washington has access to the coast, something that landlocked States like Wyoming do not. What kind of precedent does it set when States that are landlocked can have their lawful products blocked from being exported by coastal States?

Mr. GORDON. Well, so, I think this is an issue that, hearing Ms. Watson's testimony where she talked about the erosion of rights, this goes back to the beginning of our country and certainly part of the Constitution. You can read in The Federalist 6 and 7 that talk about the various rivalries between States.

What happens is when coastal States deny access to products that are either raised or produced in the center of the country, we lose our marketplace. We lose interstate commerce, we lose our ability to be able to have a good economy, and where does that all end?

If you look whimsically at how you want to apply these rules, natural gas could be one of the issues. We've seen that at Jordan Cove. Perhaps GMO grains become displeasing, and we decide we are not going to ship GMO products. Lumber, perhaps that is another thing that could be decided against, or dairy products, any of these things that can be traded internationally.

Mr. Chairman, I think it is about balance. That is exactly what your bill does. It does a very good job of balancing States' rights to co-manage their own affairs with those that have to do with the Commerce Clause of the Constitution.

Senator BARRASSO. Governor Stitt, you have a lot of experience with permitting gas pipelines in Oklahoma. How does Oklahoma protect water quality while permitting these critical pipelines?

Mr. STITT. Our DEQ certification process, we look at that and make sure that all of it administratively is complete. Then we look at all the maps, the drawings, the studies, the environmental impact assessments, the plans, information related to endangered, rare, or threatened species. Then we start going through the surface water and the groundwater and the natural resources potentially affected by any of these activities. Then we make sure that it meets with all the Clean Water Act's and then our State quality standards, and we do all this within 60 days.

I would like to just share with you some of the facts that we are so proud of in Oklahoma. Oklahoma was No. 1 in the Nation in phosphorus load reduction in 2018 in our water bodies. Oklahoma was No. 3 in the Nation in nitrogen load reductions in 2018. Oklahoma is No. 1 in the Nation for non-point source success stories, with more water bodies de-listed from the impaired list than any other State.

So we have some of the cleanest water, and yet we are the pipeline capital of the world, so the Diamond pipeline that runs just south of Tahlequah, Oklahoma, was just ranked the cleanest and the best tasting water in the country. We are very satisfied with our water quality standards and how we review all those 401 applications.

Senator BARRASSO. Thank you.

Senator Duckworth.

Senator DUCKWORTH. Thank you, Mr. Chairman. From the testimony so far, you would think that this was a hearing about the importance of coal as an energy source, as a global energy source, as well as coal as a major provider of employment, and I could not agree with either more. Illinois is also a major exporter of coal, and we are also a State from the center of the country that must export through coastal States.

But what this hearing is really about is about States' rights and tribal governments' rights to evaluate the impact of pollution, and really, about the EPA's proposed revision to Section 401. So let's focus ourselves back on the issue at hand.

The EPA's proposed revision to Section 401 would narrow the scope of what States can evaluate in reviewing a project's water quality impact, and it only allows them to consider the direct impact of a point sources discharge on water quality.

However, major infrastructure projects can have both direct and indirect effects on water quality. For instance, pipelines can directly degrade water quality through leaks or spills. They can also indirectly harm water quality through runoff and soil erosion during construction.

I am very pleased to hear that Oklahoma has done a wonderful job of safeguarding your water sources and making sure that your

pipelines are cleanest and safest. I would think that other States would like to have the ability to safeguard their own water sources.

Ms. Watson, of the State agencies that commented on the rule, nearly 75 percent expressed serious concerns about this provision. Are you concerned about this narrower scope, and how would this impact your State's ability to protect your water resources?

Ms. WATSON. Absolutely, Senator, and thank you for the question. The rule would absolutely impact every State's ability to protect water resources, so in Washington, it would be Puget Sound and the Columbia River. In Florida, it would be the Everglades, and in your lovely State, it is the Great Lakes.

There is no question that there would be greater water pollution, both as a result of the EPA rule and from Senate Bill 1087, because it so drastically narrows the scope of what can be considered.

As Governor Stitt was talking about what Oklahoma considers groundwater standards and protections for endangered species, looking at all State water quality requirements, all of those things would be on the chopping block as a result of both the bill and the rule. States would no longer be able to fully protect against water pollution, and that is a big problem.

Senator DUCKWORTH. Thank you. The stated purpose of EPA's proposed rule is to increase the transparency and efficiency of the 401 certification process and to promote timely review of infrastructure projects. Yet the EPA is imposing new administrative burdens on States as part of this rule, requiring them to provide substantial amounts of new information, including legal citations to the EPA just to justify their decisions to grant certifications with conditions, all under a new constraint application review timeline.

Ms. Watson, considering the number of 401 certification applications that the Washington Department of Ecology receives and processes each year, how do you anticipate these new requirements will affect the State's efficiency in processing applications?

Ms. WATSON. Actually, and ironically, Senator Duckworth, I think what would happen is that you would actually see States denying more 401 certifications. So, a rule that is intended to streamline 401 certifications is going to have the unintended consequence of resulting in more denials, because States can't make decisions without full information. Then on top of that, the States have to pad their decisions to convince the Federal agency that the decision they have made is the correct one.

I think what you are going to find is more denials across the board. A lot of States raised that in their comment letters as well.

Senator DUCKWORTH. Thank you. It is proposed that the EPA list seven basic components that project proponents must provide in order to constitute a complete certification request and trigger review period. Do you agree that the EPA should constrain the amount of information the project proponents must provide to States?

Ms. WATSON. Absolutely not, Senator. The problem is then States will not have the information they need to determine that water pollution will not result from the Federal project, and the results will be unclean water, dirtier water, across the country for our families and our communities.

Senator DUCKWORTH. Thank you, and I actually want to say that this is really about these particular changes to this one rule. This is not a hearing about coal, in fact.

I am proud that Illinois just received a grant for clean coal. I want America to own clean coal, carbon capture sequestration technology. I want to sell American coal overseas. This is actually about States' abilities to safeguard their own water supply under this one particular rule, so let's focus on that.

Thank you, Ms. Watson.

Senator BARRASSO. Thank you, Senator Duckworth.

Senator Inhofe.

Senator INHOFE. Thank you, Mr. Chairman.

Governor Stitt, as you said in your testimony, Oklahoma has been on the front lines in America's energy independence, and it has worked. America leads the world in oil and gas production, and we have done all this while reducing pollution and leading the world with the cleanest drinking water. You've already talked about that.

Let's talk about the economic impact of energy produced in Oklahoma. One in five jobs are tied to oil and gas production, with an average salary in this industry is over $94,000. Governor Stitt, what would happen to Oklahoma's electricity and energy prices if natural gas production ceased to exist?

Mr. STITT. Thank you, Senator. It would be devastating to our economy. Our energy costs, our electricity costs to the consumer would more than double. We get 42 percent of our electricity generation from natural gas. Without natural gas to generate that baseload, when the winds don't blow, when the sun doesn't shine, we would be without power. It would be devastating to the electric grid.

Twenty-eight percent of our revenue comes from the oil and gas industry, so countless numbers of jobs; it would just be devastating to our economy.

Senator INHOFE. Let's talk about other States, how Oklahoma can help lower costs of other States' electricity and energy bills.

Mr. STITT. With the amount of natural gas that we have, we would love to be able to transport that to other States to help with their energy costs, their generation. Natural gas is such a clean burning fuel that we would love to be able to transport that to other States and help with their low energy costs as well.

Senator INHOFE. Hopefully in the same way that it has been helping us for a long period of time.

Mr. STITT. Absolutely. I just want to tell you one other fact that I think is significant. Since 2011, Oklahoma has reduced its emissions by nearly double the national average. Sulfur dioxide is actually down by 56 percent, nitrogen oxide is down by 69 percent, carbon dioxide is down by 37 percent in Oklahoma, so we are definitely leading the way in our emissions reductions.

Senator INHOFE. Yes, and we can't overlook the President's policies and how successful they have been. A lot of our colleagues often claim that Republicans don't care about the environment. It couldn't be further from the truth, as you pointed out.

If you are looking at since 1970, the combined emissions of the six pollutants dropped by 74 percent while the economy grew by

275 percent. Now, this is even more astonishing when you look at since 2005, the U.S. energy related CO_2 emissions fell by 14 percent, while global emissions increased by over 20 percent. It is hardly believable.

Is there anything that you have not spoken to already on what Oklahoma has done to protect water quality? Because we have the best that is out there.

Mr. STITT. I love the stats in our State, and I have already outlined them about the pipeline capital of the world, but yet the cleanest water, and the reduction. We are No. 1 in several categories in reducing non-point and also nitrogen into our water bodies. So, just excellent success stories in Oklahoma.

Senator INHOFE. It really is. In fact, this morning, my wife was pointing out one of the bottled water things. It came from Tahlequah, Oklahoma.

Anyway, we are doing a great job. Let's try to share that with others.

Thank you, Mr. Chairman.

Senator BARRASSO. Thank you, Senator Inhofe.

Senator Cardin.

Senator CARDIN. Well, thank you, Mr. Chairman.

I thank all three of our witnesses for their testimony. This is certainly an area of great interest.

I spent 20 years of my life in the State legislature, 8 as Speaker, so the ability of the States to work in partnership with the Federal Government, federalism to me is very, very essential and important to our system of government.

So Mr. Chairman, I first ask unanimous consent to submit comment letters by the National Governors Association; the Attorneys General of the States of Washington, New York, California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Michigan, Minnesota, New Jersey, New Mexico, North Carolina, Oregon, Rhode Island, Vermont, Wisconsin, the District of Columbia, the Commonwealth of Massachusetts, Pennsylvania, Virginia; the Maryland Department of Environment and the Waterkeepers Chesapeake, and the Chesapeake Bay Foundation of concern about the Chairman's bill.

Senator BARRASSO. Without objection. We accept them all.

[The referenced information follows:]

NATIONAL GOVERNORS ASSOCIATION

CHAIR
Larry Hogan
Governor of Maryland

VICE CHAIR
Andrew Cuomo
Governor of New York

October 18, 2019

The Honorable Andrew Wheeler
Administrator, Environmental Protection Agency
1200 Pennsylvania Ave., NW
Washington, DC 20004

Dear Administrator Wheeler:

We write to you on behalf of the nation's governors regarding the Environmental Protection Agency's (EPA) recently proposed rule, "Updating Regulations on Water Quality Certification" (Docket ID No. EPA-HQ-OW-2019-0405).

As governors, we are committed to ensuring that state authority to maintain and protect water quality is preserved. The Clean Water Act makes clear that it is the policy of Congress to recognize, preserve and protect the primary responsibilities and rights of States to prevent, reduce and eliminate water pollution. It is critical that States are actively involved in a cooperative effort to develop any policy and administrative procedures that impact water quality.

We are concerned that the proposed rule would impact vital authority that Congress preserved for the States under Section 401 of the Clean Water Act. We urge EPA to take these concerns into consideration before the publication of any final rule, and we ask that you create meaningful and substantive opportunities for governors to provide input on its development.

We stand ready to work with you to ensure any regulatory changes protect health and safety, provide certainty and stability, and preserve states' authority.

Sincerely,

Governor Janet Mills
Chair
Natural Resources Committee

Governor Larry Hogan
Chair
National Governors Association

Maryland
Department of
the Environment

Larry Hogan, Governor
Boyd K. Rutherford, Lt. Governor

Ben Grumbles, Secretary
Horacio Tablada, Deputy Secretary

October 21, 2019

The Honorable Andrew R. Wheeler
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

RE: Docket ID EPA-HQ-OW-2019-0405-0025
Updating Regulations on Water Quality Certification

Dear Administrator Wheeler:

As Secretary of the Maryland Department of the Environment (MDE), I have been asked by Governor Larry Hogan to provide comments on the above-referenced proposed rule (Proposed Rule) governing water quality certification under Section 401 of the Clean Water Act (CWA), which was promulgated by the Environmental Protection Agency (EPA) on August 22, 2019.

Maryland has previously expressed, in its April 15, 2019 letter to EPA, the strong recommendation that changes to regulations implementing the CWA not undermine Maryland's progress and substantial investment of state resources in restoring the Chesapeake Bay. This includes concern over changing the definition of "Waters of the United States" in a manner which would threaten downstream state water quality. MDE believes that Maryland's progress could be further hindered by the Proposed Rule.

The Proposed Rule, issued by EPA in response to Executive Order 13868, would, if finalized and upheld, undermine state authority and jeopardize the ability of states to protect their waters from pollution associated with federally permitted activities. There is no question that states have the legal authority regulate the quality of their waters more stringently than federal law might require.[1] Yet, in this proposed rule, EPA puts forth a series of constraints on state implementation of CWA Section 401 that are contrary to law and fundamentally different from the positions EPA has taken over the past 40 plus years in overseeing the implementation of CWA Section 401. The cumulative effect of these constraints is to substantially diminish the authority reserved by Congress to the states to protect their waters from pollution.

In particular, by altering the scope of CWA Section 401 certification review, and granting authority to federal permitting agencies to review and effectively "approve" or "disapprove" state-issued

[1] *See* 33 U.S.C. §1311(b)(1)(C) (permitting states to impose "any more stringent limitation" to achieve water quality) and *PUD No. 1 of Jefferson Co. v. Wash. Dept. of Ecology*, 511 U.S. 700, 723 (1994) (stating that the CWA "explicitly recognizes States' ability to impose stricter standards").

certifications, the Proposed Rule has the effect of transferring decision-making authority from the states to the federal permitting agencies. Such a fundamental change could only be made by Congress.

This cover letter summarizes MDE's major concerns, which are described in greater detail in Attachment 1. Some of these comments were previously submitted by MDE and other states in response to Executive Order 13868.

1. **Reduction of State Authority**

MDE strongly objects to the cumulative impact of the proposed changes, as they are an unlawful reduction of state authority reserved to states by Congress. The Proposed Rule weakens state authority and does not comport with Congressional intent in the CWA to "recognize, preserve, and protect the primary responsibilities and rights *of States* to prevent, reduce, and eliminate pollution, [and] to plan the development and use (including restoration, preservation, and enhancement) of land and water resources.[2]

2. **Increase in Federal Oversight**

The Proposed Rule creates a new oversight role for the federal permitting or licensing agency that is not articulated anywhere in CWA Section 401. The legislative history of the CWA reflects that Congress intended *no federal role* in the review and "approval" of state certification decisions under Section 401. The Proposed Rule nonetheless gives the federal permitting or licensing agency the authority to determine whether a denial of a Section 401 certification is based on reasons "within the scope of section 401," and it gives the federal permitting or licensing agency the authority to determine whether a state-imposed condition satisfies EPA's proposed definition of a "water quality requirement." MDE objects to these provisions, as this authority is not articulated in the CWA and the legislative history is clear as to Congressional intent that the appropriate venue for a challenge to a state certification decision is *state* review in *state* court.

Subpart E of the Proposed Rule states that EPA "may, and upon request shall, provide federal agencies, certifying authorities, and project proponents with assistance regarding determinations, definitions and interpretations with respect to the meaning and content of water quality requirements, as well as assistance with respect to the application of water quality requirements in particular cases and in specific circumstances concerning a discharge from a proposed project or a certified project." This language impermissibly expands the role Congress has established for EPA in CWA Section 401(b). The legislative history makes clear that Congress did not intend that EPA have any authority to independently review state certifications, and that Section 401(b) was intended to limit EPA's role to cases where a state has *requested* assistance.

[2] 33 U.S.C. §1251(b) (emphasis added).

3. Reduction in the Scope of State Review & Certification

a. Point Source Issue

CWA Section 401 requires certification for any federally-permitted activity that may result in a "*discharge* to navigable waters."[3] While it is well established that the term "discharge" is broader than the term "point source,"[4] the Proposed Rule limits state certification review to discharges from a point source. MDE objects to this proposal because it is contrary to the plain language of the CWA and related Supreme Court decisions.

b. Definition of Water Quality Requirements

The Proposed Rule limits the scope of state review to assuring that a discharge from a federally licensed or permitted activity will comply with applicable provisions of CWA Sections 301, 302, 303, 306 and 307 and *only* EPA-approved state or tribal CWA regulatory program provisions. This contradicts the language of CWA Section 401(d), which requires that certifications include conditions to assure compliance with "any applicable effluent limitations and other limitations, under 1311 or 1312 of this title, standard of performance under section 1316 of this title or prohibition, effluent standard, or pretreatment standard under section 1317 of this title, *and with any other appropriate requirement of state law*" (emphasis added). MDE strongly disagrees with this proposal because it is contrary to the purpose of CWA Section 401, which is to ensure that *state* requirements for water quality—not solely federally approved state requirements for water quality—are met by federal permittees/licensees.

4. Mandate on States to Develop the Least Stringent Condition

The Proposed Rule requires states to include in any Section 401 certification that contain conditions a "statement of whether and to what extent a less stringent condition could satisfy applicable water quality requirements." There is nothing in the statutory language or legislative history that suggests that Congress intended to place this burden on states. Even if such a requirement was legal under the CWA, it introduces a new analytical step in the certification process that will make it more difficult for states to act expeditiously on applications for water quality certifications.

5. Impacts on Other Jurisdictions

The Proposed Rule states that "the Administrator *at his or her discretion* may determine that the discharge from the certified project may affect water quality in a neighboring jurisdiction" (emphasis added). This conflicts with CWA Section 401(a)(2), which requires EPA to notify neighboring states "whenever a discharge may affect, as determined by the Administrator, the quality of the waters of any other State." Nothing in the language of the CWA supports a conclusion that this requirement is discretionary.

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[3] 33 U.S.C. §1341(a)(1) (emphasis added).
[4] *See S.D. Warren Co. v. Maine Board of Environmental Protection*, 547 U.S. 370 (2006) (concluding that the term "discharge" is broader than "point source").

MDE is also concerned about the lack of articulated criteria to ensure that the EPA Administrator accurately determines whether there may be an effect on water quality in another state. Such criteria should be provided in regulation, and they should address how EPA would determine when there *may* be an impact to another state, the information that EPA must provide to states, and a requirement to develop operating procedures with individual states to ensure effective implementation of this important provision of the CWA.

6. Review Process Flaws

The Proposed Rule prescribes a list of what is to be included in a certification request, but based on MDE's experience regulating water quality matters, the list lacks basic information that would likely be necessary for a state to appropriately and efficiently render a decision on the request. Examples of such omitted information include (i) a description and quantification of water quality impacts; (ii) the extent of discharges; (iii) methods of construction; and (iv) potential post-construction discharges. States should be permitted to define what information is needed for a "complete" application, including project-specific information identified in pre-request meetings.

The Proposed Rule defines the start of the "reasonable period of time" for state decisions as the date the certification request is made. As described above, if the narrow requirements of the Proposed Rule are adopted, these requests are likely to include inadequate information. It is unreasonable to start the time period for a state certification decision before a state has been given substantially all of the information needed to make that decision.

The Proposed Rule states that, if the federal permitting agency receives the state certification decision prior to the end of the "reasonable period of time" and finds it deficient, the federal permitting agency may offer the state the opportunity to remedy the deficiency—but if not remedied in time, the federal agency will declare "waiver." The Proposed Rule does not establish any timeframe in which the federal permitting agency must provide a state this opportunity for a remedy. In order for such an opportunity to be meaningful, the federal permitting agency must be required to act promptly, and to give the state as much time as possible to respond.

MDE suggests that EPA focus on revisions that will ensure a more efficient 401 certification review process by states, including: (a) requiring applicants for federal permits or licenses to communicate with state authorities before the submittal of a request for Section 401 certification to obtain a list of necessary project-specific information; (b) requiring applicants for federal permits or licenses to submit all information that a state requires when the request for certification is made; (c) establishing the date that a state acknowledges that all the necessary information has been provided as the date of receipt of the Section 401 request; (d) allowing states up to six months to conduct their review with provisions for extension for up to an additional six months if a state requests the additional time; and (e) allowing states to deny certification in the event that an applicant fails to provide the required information that would allow a state to affirm that water quality-related requirements of state law have been met.

The Proposed Rule also undermines efficient review for federal consistency under the Coastal Zone Management Act (CZMA). Federal consistency review under the CZMA provides states with an

important tool to manage coastal uses and resources, to facilitate cooperation and coordination with federal agencies, to work with nonfederal entities seeking federal approval and authorizations, and to balance competing interests such as energy development, tourism, recreation, and ecological protection. The Proposed Rule does not consider interactions of 401 certification and CZMA. MDE recommends that the timeframe for Section 401 review should never be shorter than the CZMA federal consistency period (6 months)—particularly for activities in the coastal zone.

7. Pre-request Procedures for Administrator Certifications

MDE supports required pre-application meetings/communications and early coordination and identification of potential issues and information needs as EPA has prescribed for certifications performed by the Administrator. MDE supports EPA placing into regulation similar requirements for "applicants" for Section 401 certification.

8. Factual Errors Regarding Maryland Review Process for Conowingo Dam

There is also one matter that MDE respectfully requests that EPA correct for the record. The preamble to the Proposed Rule includes an incorrect description of the factual circumstances surrounding the State of Maryland's review process for the water quality certification for the re-licensing of the Conowingo Dam hydroelectric project. It describes the Conowingo water quality certification process as an example of a situation where: "certifying authorities have requested 'additional information' in the form of multi-year environmental investigations and studies...before the authority would begin review of the certification request." As support for this statement, footnote 44 cites the opinion of the U.S. District Court for the District of Columbia in *Exelon Generation Co. v. Grumbles,*[5] claiming that the "State of Maryland's request for a multi-year sediment study resulted in Exelon withdrawing and resubmitting its certification request multiple times to prevent waiver while the company completed the study."[6]

The court's opinion in *Exelon* did not address the issue of waiver. Rather, the State of Maryland had filed a motion to dismiss based on numerous grounds, including venue. The court's opinion denied the motion to dismiss *as to venue only*;[7] the remainder of the motion remains pending. To the extent court's opinion describes the Conowingo certification application process at all, it relies exclusively on the factual allegations of Exelon's complaint, which the court must accept as true solely for the purposes of ruling on a motion to dismiss. The court did not make any independent determination on the truthfulness of those allegations.

MDE also rejects the assertion that the applicant in the Conowingo matter withdrew its request for a water quality certification "to prevent waiver." At the time the applicant withdrew its request, MDE had unequivocally stated its intent to *deny* the request due to insufficient information provided with respect to the impacts of the activity on water quality.[8] The applicant could have allowed MDE to

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[5] 380 F. Supp. 3d 1; 2019 WL 1429530 (D.D.C. 2019).
[6] 84 Fed Reg. 44114.
[7] The State has filed a motion for reconsideration of the court's ruling as to venue, which is pending.
[8] Public Notice, Department of the Environment solicits comment, schedules public hearing on Water Quality Certification application for proposed Conowingo Dam relicensing, Md. Dep't of the Env't (Nov. 18, 2014).

proceed with the denial, then challenged the denial through appropriate judicial means. Instead, the applicant voluntarily withdrew the request, presumably to avoid that outcome.[9]

MDE remains available to coordinate with EPA on improvements to the CWA Section 401 certification process. Please do not hesitate to contact me or Mr. Lee Currey at lee.currey@maryland.gov for additional information and questions.

Sincerely,

Ben Grumbles
Secretary

cc: Jeannie Haddaway-Riccio, Secretary, Maryland Department of Natural Resources
Tiffany Waddell, Senior Advisor & Director, Federal Relations
Maryland Congressional Delegation

Attachment

[9] The request was resubmitted shortly thereafter, consistent with longstanding policy of the Federal Energy Regulatory Commission allowing license applicants to withdraw requests for water quality certifications, provided that a new request is submitted within 90 days.

WATERKEEPERS® CHESAPEAKE

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Mrs. Lauren Kasparek,
Oceans, Wetlands, and Communities Division
Environmental Protection Agency
1200 Pennsylvania Avenue NW
Washington, DC 20460
submitted electronically via regulations.gov

Docket ID No. EPA-HQ-OW-2019-0405

Dear Mrs. Kasparek,

The undersigned members of Waterkeepers Chesapeake (WKC) thank you for the opportunity to provide the following comments on the United States Environmental Protection Agency's (EPA) *Proposed Rule* providing updates and clarifications to the substantive and procedural requirements for water quality certification under the Clean Water Act ("CWA") Section 401. Waterkeepers Chesapeake is a coalition of 18 Riverkeepers, Waterkeepers, and Coastkeepers from Pennsylvania to Virginia working to make the waters of the Chesapeake and Coastal Bays swimmable, drinkable and fishable once again. We are committed to maintaining and restoring clean water to the rivers and streams throughout the Chesapeake Bay region and we rely on the Clean Water Act as the foundation of restoration and protection efforts.

1. Background

Any major development project, like a pipeline or a dam, that has the potential to pollute into navigable waters requires a "water quality certification" (WQC) under Section 401 of the Clean Water Act from the state or tribe where the proposed pollution will occur. The WQC is a way for the state or tribe to either (1) review and "certify" that the federally-licensed project will not have a significant impact on the quality of state waterways, (2) place certain pollution prevention conditions on the project to minimize the impacts of a project, or (3) deny certification all together because the impacts of the project on local water quality would be too significant. More often than not, states and tribes will allow federally-licensed projects to move forward under Section 401, but in some egregious instances, a state will deny a project.[1] However, the federal government must first have the approval of the state through the WQC before granting the new

[1] For instance, Washington State was able to prevent a coal export terminal on the Columbia River and New York denied water quality certification for a major, 124-mile long natural gas pipeline carrying fracked gas.

construction of any major project. The CWA also requires states to issue or deny the water quality certification in a reasonable time, not to exceed one year, or it will be considered waived.

Courts have overwhelmingly affirmed the broad authority that the CWA grants to states and tribes to review and determine the fate of certain federal projects that would negatively impact local waterways. The importance of this authority is best explained in the United States Supreme Court case, *S.D. Warren Co. v. Maine Board of Environmental Protection, et. al.* from 2006. The Supreme Court states,

> State certifications under §401 are essential in the scheme to preserve state authority to address the broad range of pollution, as Senator Muskie explained on the floor when what is now §401 was first proposed: "No polluter will be able to hide behind a Federal license or permit as an excuse for a violation of water quality standard[s]. No polluter will be able to make major investments in facilities under a Federal license or permit without providing assurance that the facility will comply with water quality standards. No State water pollution control agency will be confronted with a fait accompli by an industry that has built a plant without consideration of water quality requirements." 116 Cong. Rec. 8984 (1970). These are the very reasons that Congress provided the States with power to enforce "any other appropriate requirement of State law," 33 U. S. C. §1341(d). by imposing conditions on federal licenses for activities that may result in a discharge...

States have wielded the authority given to them through the CWA with increasing efficacy in the last few years to prevent projects from being developed within their borders from having lasting impacts on the quality of their local waterways. However, the *Proposed Rule* would limit the steps that states can take to protect their waterways.

The *Proposed Rule* at hand will significantly erode state authority under the CWA by: (1) preventing states from denying projects that will, as a whole, directly and negatively impact the state's water quality; (2) preventing states from placing conditions on projects that relate to the overall water quality impacts of a project, rather than just the specific "discharge" from the project; (3) restricting the time available to states and tribes to review and make decisions about major projects impacting their local waterways; and, (4) providing an outsized role for federal agencies in the WQC process, in the name of economic development. The *Proposed Rule* would grant substantial discretion to the federal government to force multi-state projects through, without state or local buy-in. If finalized as is, the *Proposed Rule* would represent a major shift in how Section 401 under the Clean Water Act is implemented and enforced by states and tribes.

2. Limited Scope of State Review and Decision-Making Authority

a. State or Tribe WQC Denials

By significantly limiting the scope of review, the *Proposed Rule* would actually codify dissenting opinion in a U.S. Supreme Court case and give EPA authority to reject a state or tribe's WQC denial if that denial is not directly tied to a specific discharge from the project or a federally imposed water quality requirement under the CWA.[2] For decades, states have considered the broader water quality impacts of proposed projects as a whole when reviewing applications for WQC under Section 401. However, the specific question of whether a state or tribe's Section 401 review is limited to the specific "discharge" was answered by the Supreme Court in 1994 in *PUD No. 1 of Jefferson County v. Washington Department of Ecology*. In this case, the state of Washington was reviewing a Section 401 application for a hydroelectric dam. The dam owner claimed that state authority under Section 401 was restricted to only assessing whether a project would "discharge" in a way that would violate the CWA. The Supreme Court disagreed and affirmed state authority to make a Section 401 determination based on the broader water impacts of the activities associated with any given project.[3] Justice Clarence Thomas's dissenting opinion in *PUD No. 1* advocated for state review to be limited to the specific discharge from the federally-licensed project.

There's an overwhelming amount of judicial precedent in support of the broad authority Section 401 provides to states and tribes.[4] The longstanding authority for states to make these broad determinations has been backed by the courts time and time again -- who better to make determinations about how a proposed multi-state or federal project will impact *local* water quality than the state charged with enforcing its own water quality standards? EPA's regulations from 1971, prior to the Clean Water Act, support the holding in *PUD No. 1* and the longstanding regulatory practice of granting states and tribes broad leeway to make 401 determinations. And even more importantly, the plain language of the CWA supports this holding and regulatory

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[2] Updating Regulations on Water Quality Certification, Proposed 40 CFR 121.3, 121.1(p) (Aug. 22, 2019) ("The scope of Clean Water Act section 401 certification is limited to assuring that a discharge from a Federally licensed or permitted activity will comply with water quality requirements… Water quality requirements means applicable provisions of 301, 302, 303, 306, and 307 of the Clean Water Act and EPA approved state or tribal Clean Water Act regulatory program provisions."); see also Proposed 40 CFR 121.6, 121.7, 121.8.

[3] 511 U.S. 700 (1994).

[4] S.D. Warren Co. v. Maine Board of Environmental Protection (2006).

practice: states or tribes may deny WQC if the state or tribe has reason to believe that a project will violate the state's water quality standards or any other appropriate state law.[5]

The rule would also prevent states and tribes from enforcing any state laws or regulations that deal with water quality in the WQC process, unless that state law or regulation had already been approved by the EPA. This calls into question whether any new state and tribal laws aimed at promoting clean water would ultimately be approved by the EPA, if that approval hinges on whether the law directly relates to federally-licensed "discharges," as narrowly defined by the EPA.

Recommendation: EPA should remove any additional limits on state or tribe WQC denials under the *Proposed Rule* all-together, as current regulations are adequate.

b. State or Tribe WQC Conditions

In a similar vein, the *Proposed Rule* also limits the types of conditions states may impose on projects that fall under Section 401. Under the rule, if a state or tribe decides to impose conditions on a project through a WQC, the appropriate federal licensing agency could reject any or all of the conditions by determining that it exceeds the defined scope.

State and tribe authority to impose conditions under Section 401 has been the bedrock of allowing projects to move forward in a way that least harms the state or tribe's waterways. For decades, states and tribes have utilized their expansive authority to impose conditions on projects that require WQC and this authority -- like the authority to deny WQC -- has been strongly backed by the courts and incorporated into the CWA Section 401 regulatory scheme. There is no administrative record on which EPA can base its reversal of Supreme Court precedent and nearly 50 years of consistent practice. For instance, Virginia's WQC for the Atlantic Coast Pipeline (ACP) imposed conditions that went well beyond addressing just the temporary pipeline construction impacts to wetlands and streams with the intent to protect local water quality across the broad range of pipeline activities actually taking place. Conditions imposed on the developers of the ACP -- which would potentially be thrown out under the *Proposed Rule* had it been finalized at the time Virginia issued the WQC -- addressed sediment, erosion, karst geologic studies, steep slopes, public water supplies, and areas prone to rockslides, to name a few. All of these are aimed at the very real impacts a pipeline project could have on Virginia's water quality,

[5] 33 U. S. C. §1341 (4) ("...the licensee or permittee shall provide an opportunity for such certifying State...to review the manner in which the facility or activity shall be operated or conducted for the purposes of assuring that applicable effluent limitations or other limitations or other applicable water quality requirements will not be violated.")

which in turn impacts the health of the Chesapeake Bay. Likewise, as explained in more detail below, all of these water quality protections imposed through conditions under the WQC could be interpreted by any federal permitting or licensing agency as outside the new limited scope under the *Proposed Rule* and thrown out altogether.

Under the *Proposed Rule*, any certification decision that would impose conditions on a project would need to be limited to only the "discharges" from the project. More specifically, the *Proposed Rule* would require that, for each condition, the certifying state or tribe provide the following:

1. A statement explaining why the condition is necessary to assure that the discharge from the proposed project will comply with water quality requirements;
2. A citation to federal, state, or tribal law that authorizes the condition; and
3. A statement of whether and to what extent a less stringent condition could satisfy applicable water quality requirements.[6]

Moreover, conditions would only be considered "within the scope" of Section 401 if they implement specific provisions of the Clean Water Act or "EPA-approved state or tribal … regulatory program provisions."[7] Based on this, under the *Proposed Rule*, a state may not impose conditions that are based on broader water quality goals and other appropriate requirements of state law, such as groundwater protection provisions meant to protect surface waters, construction season restrictions meant to prevent landslides, impacts from soil erosion, impairment of riparian habitat, requirements for karst surveys and dye studies, maintenance of buffer or revegetation, protection of intermittent streams, compensatory mitigation under state law, and the list goes on. While these are very real water quality considerations for states and tribes to consider when reviewing the impacts of a proposed federally-licensed project, under the *Proposed Rule* the permitting and licensing agencies would have the authority to unilaterally remove any state or tribe imposed condition relating to these impacts. The rule does not even require the EPA to work with the state or tribe to remedy the condition.

If the *Proposed Rule* moves forwards as is, this provision would be a reversal of longstanding judicial precedent, including *American Rivers v. FERC*,[8] that have affirmed the broad ability states and tribes have to impose conditions related to the water quality impacts of any given project and the inability of the federal government to reject those conditions. Likewise, the

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[6] Proposed 40 CFR 121.8. Note that there is no basis in federal law for the third statement.

[7] Proposed 121.3, 121.1(p).

[8] 129 F.3d 99 (2nd Cir. 1997)(holding that the federal government cannot reject any certification conditions timely imposed by states or tribes).

limited ability for states to impose conditions under the *Proposed Rule* would go against the plain language of the Clean Water Act, which states "[a]ny certification provided under this section *shall* set forth any… other appropriate requirement of State law set forth in such certification, and shall become a condition on any Federal license or permit…" (emphasis added).[9] This language makes it pretty clear that the federal permitting authority does not have the authority to reject any state or tribe-imposed conditions.[10]

Recommendation: The *Proposed Rule* must remove any language related to limits on state or tribe-imposed conditions for federally-licensed projects. The invention of a restrictive definition of "water quality requirements" that bears no relationship to existing state and tribal practice nor to the term "any other appropriate requirement of State law" in section 401(d) itself, cannot stand.

We also ask that the EPA allow each state or tribe to come up with its own standard form and process for handling all projects that need water quality certifications under Section 401. EPA's suggestion that it may generate a federal standard form that states or tribes would be required to use just continues the trend of federal encroachment in an area that best belongs to the states and tribes. This would essentially only allow states and tribes to review every project in a vacuum -- and the vacuum would be completely orchestrated and manufactured by the federal government -- turning state authority on its head. Currently, a large majority of states already have standard applications for CWA Section 401 applicants. We agree that having an available state application puts applicants, the public, and state officials on notice for what to expect for under the state's 401 water quality review of any given project. But every state has specific water quality needs that are complex and would not be best captured by a federally mandated form.

3. Restricted Timelines for States and Tribes to Review WQC Applications

EPA's *Proposed Rule* further restricts state and tribe authority by recommending that the one-year clock for states to make a decision on a water quality certification begins when the state or tribe receives the initial request, even if an incomplete request was submitted.[11] Thus, the rule establishes one-year as the "absolute outer bound," regardless of the complexity of the case or

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[9] 33 U. S. C. §1341(d).

[10] *Id.* ("Any certification provided under this section shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply with any applicable effluent limitations and other limitations, under section 1311 or 1312 of this title, standard of performance under section 1316 of this title, or prohibition, effluent standard, or pretreatment standard under section 1317 of this title, and with any other appropriate requirement of State law set forth in such certification, *and shall become a condition on any Federal license or permit* subject to the provisions of this section.") emphasis added.

[11] Proposed 40 CFR 121 III. E.

the lack of needed information provided by applicants. Currently, the one-year clock begins after the appropriate state agency receives a "complete application." State agencies have the authority to determine when the application is deemed complete. The EPA takes the preposterous position that the CWA "makes no mention of a state or tribe's authority to determine that a request is incomplete..." and therefore it would be "inappropriate" for states to require having all of the facts and relevant information before starting the clock. It's unclear how states can do their due diligence in ensuring that a project won't dramatically impact local water quality without having all the relevant information to make that determination. Further, the strict timeline under the *Proposed Rule* for a state or tribe to act on a certification request is not accompanied by any mechanism to extend the deadline.

The *Proposed Rule* grants the federal government substantial discretion (clearly unintended by the legislation's drafters) to impose shorter periods of time for state's to review projects. With this *Proposed Rule*, the EPA is forcing states to run a foot race but refuses to tell them where the finish line is or how long they have to get there until the race has already begun.

State authority to conduct these water quality certifications under the CWA is further usurped by the *Proposed Rule* which suggests that the *Hoopa Valley* decision made clear that states are not allowed to restart the one year clock -- even if an application is submitted to the state, then fully withdrawn due to incompleteness, then re-submitted again at a much later time.[12] This was the case in Maryland when Exelon submitted a severely incomplete WQC application to continue operating Conowingo Dam for another 50 years. The WQC process for Conowingo Dam ended taking many years because Exelon fully withdrew and resubmitted the WQC application multiple times because it could not pull together information that was adequate enough for Maryland's review process, especially given the complexity of the water quality issues arising from Conowingo Dam and the substantial length of the new license. Likewise, some of the conditions Maryland ultimately imposed on the WQC for Conowingo Dam were not directly related to the "discharge" from Conowingo Dam, but the millions of pounds of sediment and pollution backed up behind the Dam, which indirectly causes discharges every time it rains in the area -- which very much affect Maryland's overall water quality, including quantitative impacts to the Susquehanna River and the Chesapeake Bay.

Under the *Proposed Rule*, EPA also suggests that federal permitting agencies are authorized to determine, on behalf of the states or tribes, that the authority to issue a water quality certification

[12]The EPA even notes in the *Proposed Rule* that the D.C. Circuit made clear in its *Hoopa Valley* decision that it did not consider the possible legitimacy of an arrangement whereby an applicant may submit a new request in place of the old one as long as the new application was not substantially similar to the old one.

has been waived if a decision is not made within the deadline set by each federal agency.[13] This could cause a situation where a developer intentionally submits an incomplete application for a proposed project, then simply waits for the clock to toll so that the state's authority is then waived. Additionally, the *Proposed Rule* allows the federal government substantial discretion in imposing shorter periods of time for states to review certain types of projects.[14] It also would forbid states from even "requesting" that an applicant withdraw an incomplete application for the purpose of restarting or modifying a timeline.[15]

The *Proposed Rule* also says that a state denial or condition outside the newly restricted "scope" of 401 certification will be treated as a "constructive" failure or refusal of the state to act, resulting in a complete waiver of 401 as determined by the federal licensing or permitting agency.[16]

Recommendation: The EPA must amend the *Proposed Rule* to allow for the certifying state or tribe to extend the deadline to act under Section 401 if the state or tribe has not received all needed information in a timely manner. In the past, states have only 'paused' the one-year clock to address outstanding and unfulfilled requests for relevant information from project applicants. This is reasonable for states and tribes to request, given the complexity of certain projects and the need to receive all information in a timely manner in order to conduct a thorough review of any given project. In addition, state denials (including denials for incomplete information) or conditions cannot be treated as constructive waivers of review.

4. Conclusion

The *Proposed Rule* would give the EPA the discretion to reject any state-imposed WQC denials or conditions it deems "deficient," or beyond the scope of addressing direct discharges from projects that require a federal license.[17] The rule attempts to give the EPA the authority to deem "constructive waiver" of a WQC, if it deems that the state has acted outside of the new limited scope of certification, as defined under the *Proposed Rule*. Nowhere in the CWA does it grant the EPA such broad authority to make unilateral calls about a state or tribe's WQC. Robust

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[13] Proposed 40 CFR 121 III. E. ("Fail or refuse to act means the certifying authority actually or *constructively fails* or refuses to grant or deny certification, or waive the certification requirement, within the scope of certification and within the reasonable period of time… [a] certifying agency constructively fails or refuses to grant or deny certification when it *acts outside the scope of certification as defined in the proposed rule*.").

[14] Proposed 40 CFR 121 III. E.

[15] Proposed 121.4(f). Forbidding such a request, and apparently allowing a federal agency to determine whether the request had an improper "purpose" completely undermines state regulatory review processes.

[16] Proposed 121.1(h), 121.6, 121.7.

[17] Proposed 121.4(f). Forbidding such a request, and apparently allowing a federal agency to determine whether the request had an improper "purpose" completely undermines state regulatory review processes.

judicial precedent actually supports the opposite as this is the one chance for states and tribes to have a say in a federally licensed project that can and will impact local waterways.
The EPA seems to be paving a path for federal agencies to loom over the shoulders, and perhaps, introduce a not-so invisible hand into states and tribes Section 401 Certification decision-making process. This is unfortunate because the Clean Water Act is very explicit in giving broad authority to states to review and prevent major projects that would have a negative impact on state water quality. States have an explicit interest and knowledge in protecting their own waterways. This authority simply doesn't belong to the federal government.

The *Proposed Rule* puts further pressure on states and tribes to make hasty decisions and open the door to greater federal agency influence. By flooding state agencies and tribes with project proposals all at once, with varying deadline dates, offices with limited resources may feel compelled to lean on the federal agencies to aid in the decision making process, effectively circumventing the broad state authority under the Clean Water Act.

A common sentiment among observers of the *Proposed Rule* is that it rolls back standards to those held in 1986.[18] The standards from over 30 years ago were the best that we could do with the scientific knowledge and experience that we had in that era. Since then our understanding of the ongoing threats to water quality has advanced exponentially. Rather than capitalizing on the decades of gained knowledge and further advancing water quality efforts, the EPA has chosen to exert extraordinary pressure on state and tribal agencies in order to blindly authorize projects that could be detrimental to public health for decades to come. In doing so, the EPA seems to be paving a path for federal agencies to loom over the shoulders of states and tribes Section 401 Certification decision-making process. Any honest and full review of the Clean Water Act would recognize that the plain language of the bill gives broad authority to states and tribes to review and prevent major projects that would have a negative impact on the water that flows within their boundaries.

States and tribes have explicit interest, knowledge, and experience in protecting their own waterways. Rather than trusting the states and tribes in that role, the *Proposed Rule* opaquely forces them to 1) waive their Section 401 certification, or 2) choose between a) granting the

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[18] *See* Juliet Eilperin and Brady Davis, *Administration finalizes repeal of 2015 water rule Trump called 'destructive and horrible'*, Washington Post, Sept. 11, 2019 ("On Thursday, the Trump administration plans to scrap the Obama-era definition of what qualifies as 'waters of the United States'... returning the country to standards put in place in 1986"); Jess Nelson, *Trump Repeals Obama-Era Clean-Water Protections*, Miami New Times, Sept. 13, 2019 ("'This is a step in the wrong direction,' says Brett Hartl, government affairs director at the Center for Biological Diversity. 'It resets us to a set of regulations from 1986.'"); Stephanie Ebbs, *Trump EPA announces repeal of Obama-era rule protecting rivers and wetlands*, ABCNews, Sept. 12, 2019 ("The Environmental Protection Agency on Thursday announced the official repeal of the Obama-era Waters of the United States rule...returning the country to water standards from 1986.").

proposed project without the benefit of a full analysis, or b) deny the proposed project only for the Federal agency to overrule the decision.

We ask that the EPA reconsider its current course of action with the *Proposed Rule*. Rather than looking in the rearview mirror for answers to today's problems, we encourage the EPA to utilize the full breadth of scientific data and experience at their disposal to protect water quality for the next 30 years and beyond.

Sincerely,

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Waterkeepers Chesapeake

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Elle Bassett, *Miles-Wye Riverkeeper*
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Tim Trumbauer, *Chester Riverkeeper*
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CHESAPEAKE BAY FOUNDATION
Saving a National Treasure

October 21, 2019

Submitted via regulations.gov

The Honorable Andrew Wheeler
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RE: EPA, Proposed Rule: *Updating Regulations on Water Quality Certification*
Docket ID No. EPA-HQ-OLEM-2019-0405

Dear Administrator Wheeler and Ms. Kasparek:

The Chesapeake Bay Foundation, Inc. (CBF) submits the following comments regarding the United States Environmental Protection Agency's (EPA) proposed rule, *Updating Regulations on Water Quality Certification.*[1] EPA is proposing to change the current regulations by limiting the timelines associated with the Section 401 water quality certification process and limiting the authority of states and tribes to issue these certifications. As stated by the Agency, the purpose of these changes is to increase efficiencies and clarify the regulations in order to encourage energy infrastructure.[2]

CBF opposes changes to the Section 401 regulations that will weaken the authority of states and tribes to ensure that their waterways are properly protected from projects requiring certain federal permits. In addition, CBF does not believe that EPA has demonstrated sufficient cause to make the proposed changes.

[1] 84 FR 44080, Aug. 22, 2019.
[2] *Id.*

I. The Chesapeake Bay Foundation

CBF is a 501(c)(3) non-profit organization, founded in 1967. The organization's mission -- carried out from offices in Maryland, Virginia, Pennsylvania and the District of Columbia -- is to restore and protect the ecological health of the Chesapeake Bay, one of the nation's most vital estuaries. As such, and on behalf of our 300,000 members and e-subscribers across the United States, we are very interested in matters that will impact the health of the Chesapeake Bay and the waters that feed into the watershed.

II. Background – Section 401 Water Quality Certifications

Under Section 401 of the Clean Water Act, states and certain tribes are authorized to: review projects that require a federal permit[3] that may result in a discharge into the state or tribe's navigable waters; determine whether the project will harm local water quality; and if so determine whether the project should be prohibited or whether conditions that will protect water quality should be place upon the project license.[4] Congress created this system under Section 401 whereby states and tribes have the authority "to act to deny a permit and thereby prevent a Federal license or permit from issuing to a discharge source within such (jurisdiction)."[5] This power over the potential impacts of such projects to the quality of local waterways and wetlands is "essential in the (Clean Water Act's) scheme to preserve state authority to address a broad range of pollution."[6] Indeed, as Senator Muskie explained on the floor when what is now Section 401 was first proposed:

> No polluter will be able to hide behind a Federal license or permit as an excuse for a violation of waters quality standard[s]. No polluter will be able to make major investments in facilities under a Federal license or permit without providing assurance that the facility will comply with water quality standards. No state water pollution control agency will be confronted with a fait accompli by an industry that has built a plant without consideration of water quality requirements.[7]

States and tribes have been properly using this authority to protect their waterways for almost fifty years. Despite this, in April of 2019, President Trump issued Executive Order 13868, titled *Promoting Energy Infrastructure and Economic Growth,* and directed EPA to update the existing certification framework. The purpose of the Executive Order is "to encourage greater investment in energy infrastructure in the United States by promoting efficient federal permitting processes and

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[3] Examples of these types of licenses or permits include, but are not limited to, "CWA section 401 NPDES permits in states where the EPA administers the permitting program, CWA section 404 permits issued by the Corps, hydropower and pipeline licenses issued by Federal Energy Regulatory Commission (FERC), and RHA sections 9 and 10 permits issued by the Corps." *Id.* at 44085.
[4] 33 U.S.C. § 1341; 1377(e).
[5] *S.D. Warren Co. v. Me. Bd. Of Envtl. Protection*, 547 U.S. 370, 380 (2006) (*quoting* S. Rep. No. 92-414, 69 (1971)).
[6] *Id.* at 386.
[7] 116 Cong. Rec. 8984 (1970), *see also S.D. Warren Co. v. Me. Bd. Of Envtl. Protection*, 547 U.S. 370, 380 (2006) (quoting S. Rep. No. 92-414, 69 (1971)).

reducing regulatory uncertainty."[8] Under the Order, EPA was directed to issue new guidance regarding the certification process within 60 days of the Order, and propose new Section 401 regulations within 120 days of the Order.[9] In response, numerous states expressed concern regarding potential changes to Section 401 guidance and regulations that would usurp their authority to protect water quality, and noted inadequacy of the timeframe under which these actions were to occur.[10] Under this accelerated timeline, on June 7, 2019, EPA released new guidance on Section 401and rescinded the 2010 document, titled *Clean Water Act Section 401 Water Quality Certification: A Water Quality Protection Tool for States and Tribes.*[11] On August 22, 2019, EPA published its proposed changes to "replace the entirety of the existing certification regulations" to increase efficiencies and clarify differing interpretations of Section 401.[12]

III. EPA's Proposed Changes to the Water Quality Certification Regulations Unnecessarily Weaken the Authority of States and Tribes to Ensure That Their Waters are Protected.

CBF opposes the changes being considered by EPA that will weaken the authority of states and tribes to ensure that their waters are protected. In particular, we urge the Agency to withdraw the sections of its proposal that arbitrarily add new timelines on the certification process and those changes that limit the scope of the certifying authority's inquiry and bases for setting conditions on and rejecting water quality certifications.

A. Timelines.

Section 401 states as follows:

> If the State, interstate agency, or Administrator, as the case may be, fails or refuses to act on a request for certification within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal application.[13]

Thus, if the state or tribal authority fails to act within one year of receiving the request for certification, the certification requirement is waived. Inherently, a request for certification should be complete so that the decision-maker can fully understand the impacts of the proposed project. The Agency's 2010 Interim Guidance properly allows for the one-year clock to begin ticking once the

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[8] 84 FR 44080, 44081-44082, August 22, 2019.
[9] *Id.*
[10] *See:* Letter from the District of Columbia Department of Energy and Environment to EPA; Letter from the Delaware Department of Natural Resources and Environmental Control to EPA; May 24, 2019, Letter from the Attorneys General in California, Colorado, Connecticut, Maine, Maryland, Massachusetts, Minnesota, New Jersey, New Mexico, North Carolina, Oregon, Pennsylvania, Vermont, and Washington in their response to the EPA's request for comment as it considers the President's "Executive Order on Energy Infrastructure and Economic Growth," issued on April 10, 2019, May 24, 2019, pp. 1-3, Docket ID: EPA-HQ-2018-0855.
[11] *Id.* at 44083. In this proposal, EPA requests comment as to whether it should rescind the June 7, 2019 guidance.
[12] 84 FR 44080, 44099, Aug. 22, 2019.
[13] 33 U.S.C. § 1341(a).

decision-maker receives a "complete application" and allows the states to determine when an application is deemed complete.[14] EPA now seeks to impose a one-year timeline as the outer bounds of a review, and offers an approach whereby the one-year clock begins immediately upon the receipt of the application, without an allowance of time for remedying deficiencies in an application.[15] Indeed, it would forbid a "certifying authority from requesting that a proponent withdraw a certification request or to take any other action for the purpose of modifying or restarting the established reasonable period of time."[16]

This approach is ill-advised and does not take into account common scenarios where an applicant for a certification submits an application that is incomplete, or the state needs additional information like environmental assessments and water quality and sediment samples to properly evaluate the application. In addition, this stunted timeline does not factor in the time it may take an applicant to compile additional information. Indeed, as noted by the District of Columbia Department of Energy and Environment, it "is critical that states and tribes are able to deem an application complete prior to the commencement of any statutory or regulatory timeline for review."[17] Instead, the proposed approach would actually encourage the submission of incomplete applications so that the process of compiling information would diminish the remaining timetable allowed for a decision-maker to analyze the information before the authority to approve the certification is considered waived. It may also lead states and tribes to simply deny applications that may have otherwise been granted (perhaps with conditions) as the deadline approaches to avoid a waiver. This approach does not allow for thorough consideration by states and tribes of the complex issues often associated with these types of projects, and circumvents the process envisioned by Congress in granting the authority to states and tribes to protect their waterways.

B. Scope and Authority of Reviews and Denials of Water Quality Certifications.
EPA's proposed rule limits the scope of a certifying authority's denial of a Water Quality Certification in a variety of ways. Two of the most egregious are: (1) limiting the basis of the denial to only those relating to the discharge; and (2) limiting the timeframe within which a state may respond to EPA's offer to identify deficiencies of the certifying authority's denial of a certification.

EPA's proposed rule limits the scope of a certifying authority's review by limiting it to ensuring "that a *discharge* from a Federally licensed or permitted activity will comply with water quality requirements,"[18] and goes on to define "water quality requirements" as the applicable provisions of

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[14] EPA, Office of Wetlands, Oceans and Watersheds, *Clean Water Act Section 401Water Quality Certification: A Water Quality Protection Tool for States and Tribes,* April 2010.
[15] 84 FR 44080, 44110, Aug. 22, 2019.
[16] Proposed Rule, Section 121.4(f), 84 FR 44080, 44120, Aug. 22, 2019.
[17] Letter from the District of Columbia Department of Energy and Environment to EPA, Docket ID: EPA-HQ-2018-0855. This sentiment was echoed in the Letter from the Attorneys General in California, Colorado, Connecticut, Maine, Maryland, Massachusetts, Minnesota, New Jersey, New Mexico, North Carolina, Oregon, Pennsylvania, Vermont, and Washington in their response to the EPA's request for comment as it considers the President's "Executive Order on Energy Infrastructure and Economic Growth," issued on April 10, 2019, May 24, 2019, pp. 9-10, Docket ID: EPA-HQ-2018-0855.
[18] *Emphasis added,* Proposed Rule, Section 121.3, Scope of Certification, 84 FR 44080, 44120, Aug. 22, 2019.

sections "301, 302, 303, 306, and 307 of the Clean Water Act and EPA-approved state or tribal Clean Water Act regulatory provisions."[19]

This narrow interpretation ignores associated impacts from a project beyond the discharge and narrows the range of laws that can be considered. This is counter to the Supreme Court's finding that states' authority in terms of what they can consider in determining whether to issue a water quality certification is broad and that states may consider impacts beyond the "discharge."[20]

In terms of allowing a certifying authority an opportunity to respond to EPA's final decision about whether the authority met the requirements of Section 401, the proposed language states: "If the certifying authority does not provide a certification decision that satisfies the requirements of Clean Water Act section 401 and this part by the end of the reasonable period of time, the Federal agency shall treat the certification in a similar manner as waiver."[21] This means that not only is the certification process restricted to the outer bounds of the one-year timeframe, but that any opportunity for the certifying authority to respond to the federal agency's concerns with the authority's denial of a certification must fit within this shortened and unreasonable timeline as well. This is contrary to the purpose behind Section 401 of granting states the authority to ensure that their waterways are protected, *within a reasonable period of time.* This also seems to give the federal agency veto power over the certification decisions of states and tribes, which is counter to the intent and plain language of the statute.

C. Scope and Authority of Decision-Makers' Authority to put Conditions on a Water Quality Certification.

The ability of states and tribes to place conditions on water quality certifications is one of the key ways in which they can ensure that their waterways are protected. Section 401 states that "[a]ny certification provided under this section shall set forth, and shall become a condition on any Federal license or permit ..."[22] In other words, the certification authority has the power to impose conditions and those conditions must be followed if the project is to move forward. EPA now proposes limiting this authority. Most troubling are the limits to the scope of the conditions that may be included in a certification and the requirement that the certifying authority provide less stringent options to satisfy water quality requirements.[23]

EPA proposes that in order to be within the scope of Section 401, and appropriate as a condition to a water quality certification, the condition must be related to the discharge at issue.[24] This would eliminate a wide variety of other very important conditions that a certification authority would view as mandatory for the project to protect water quality in its jurisdiction. Section 401 clearly states that when a certifying authority issues a 401 certification, it must include conditions so that the applicant will meet not only state water quality standards, but "any other appropriate requirement of state

[19] 84 FR 44080, 44104, Aug. 22, 2019.
[20] *See PUD No. 1 of Jefferson County v. Washington Department of Ecology*, 511 U.S. 700, 711 (1994).
[21] Proposed Rule, Section 121.6(c)(2), 84 FR 44080, 44121, Aug. 22, 2019.
[22] 33 U.S.C. § 1341(d).
[23] Proposed Rule, Section 121.5(d) (3), 84 FR 44080, 44120, Aug. 22, 2019.
[24] Proposed Rule, Section 121.3; 121.5(a); 121.5, 84 FR 44080, 44120, Aug. 22, 2019.

law."[25] In recognition of this statutory authority granted to states and tribes, the 2010 Interim Guidance "appropriately recognizes the wide range of state statutes and regulations that states have deemed 'appropriate' under this provision, including laws protecting threatened or endangered species or cultural or religious values of waters."[26]

The Agency's attempt to limit the scope of review for both the denial and for placing conditions in water quality certifications is completely counter to the well established authority states have to protect waters within their borders and the "broad discretion" they have in developing criteria for Section 401 Certifications.[27]

In addition, EPA's new requirement that a certifying authority provide a "statement of whether and to what extent a less stringent condition could satisfy water quality requirements"[28] in its certification decision with conditions is highly irregular. Rather than simply require the condition to be met so that water quality is protected, EPA is requiring certifying authorities to find the lowest common denominator with regard to water quality. This is completely in opposition to role Congress envisioned states and tribes would play under Section 401 of the Clean Water Act to "restore and maintain the chemical, physical, and biological integrity" of our Nations' waters.[29]

Not only are these proposed changes potentially harmful to waterways, they are unnecessary. Sufficient remedies are available should an applicant feel that an application process has taken too long, or should the applicant disagree with the outcome of the certification authority's decision.[30] Moreover, they circumvent the balance between the state and federal government to protect waterways, and Congress' intent to "recognize, preserve, and protect the primary responsibilities and rights of States to *prevent*, reduce, and eliminate pollution" of waters within their jurisdiction.[31]

IV. Natural Gas Pipelines and Water Quality Certifications in the Chesapeake Bay Watershed.

As noted above, one of the goals of President Trump's Executive Order, and the ensuing steps now taken by EPA, is "to encourage greater investment in energy infrastructure in the United States by

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[25] 33 U.S.C. § 1341(d); *see also PUD No. 1*, 511 U.S. at 713-714.
[26] Letter from the Attorneys General in California, Colorado, Connecticut, Maine, Maryland, Massachusetts, Minnesota, New Jersey, New Mexico, North Carolina, Oregon, Pennsylvania, Vermont, and Washington in their response to the EPA's request for comment as it considers the President's "Executive Order on Energy Infrastructure and Economic Growth," issued on April 10, 2019, May 24, 2019, p. 6, Docket ID: EPA-HQ-2018-0855.
[27] *Appalachian Voices v. State Water Control Bd.*, 912 F.3d 746, 754 (4th Cir. 2019).
[28] Proposed Rule, Section 121.5(c)(3), 84 FR 44080, 44120, Aug. 22, 2019.
[29] 33 U.S.C. § 1251(a).
[30] *See, e.g., Millennium Pipeline Co. v. N.Y.S. Dep't of Envtl. Conservation,* 860 F.3d 696, 701 (D.C. Cir. 2017) (holding that once state agency "has delayed for more than a year" an applicant's remedy is to "present evidence of waiver" to relevant federal agency,"). *See also, S.D. Warren Co. v. Maine Bd. Of Envtl. Prot.*, 547 U.S. 370 (2006); *Islander E. Pipeline Col*, 467 F.3d 295 (2nd Cir. 2006) (*Islander East I*); *Constitution Pipeline Co. v. N.Y.S. Dep't of Envtl Conservation*, 868 F.3d 87, 90-91 (2nd Cir. 2017), cert. denied 138 S. Ct. 1697 (2018); *King v. N.C. Envtl. Mgmt. Comm'n*, 426 S.E.2d 865, 869 (N.C. App. Ct. 1993); *Arnold Irrigation Dist. V. Dept' of Envtl. Qual.*, 717 P2d 1274, 1276-77 (Or. App. Ct. 1986).
[31] *Emphasis added,* 33 U.S.C. §§ 1251(b); 1370.

promoting efficient federal permitting processes and reducing regulatory uncertainty."[32] The Chesapeake Bay watershed is home to several natural gas pipelines and Virginia's recent regulatory response to the proposed construction of two massive interstate natural gas pipelines is illustrative of the importance of Section 401 certifications.[33]

The pipeline routes for the Mountain Valley Pipeline (MVP) and the proposed Atlantic Coast Pipeline (ACP) both cross the steep forested slopes of the Appalachian Mountains, cut swaths through national forestlands, carve deep trenches up and down mountain slopes and through sinkhole-prone karst terrain, and require crossings of literally thousands of rivers and streams, both perennial and intermittent. Virginia's Department of Environmental Quality (DEQ) recognized that the massive land disturbances necessary for this construction activity could pose significant threats to water quality from upland erosion and stream sedimentation,[34] and, as part of its 401 Certification process, evaluated information from the developer, the public and the existing environmental impact assessments, and developed construction conditions relating to riparian buffers, blasting in mountainous and karst regions, water quality monitoring, use of acid-forming minerals and others. DEQ believed these steps were necessary to ensure the protection of water quality. Following public hearings and approval by the State Water Control Board, these conditions were appended to the Section 401 Certifications Virginia issued for each pipeline.[35] Notably, many months into the pipeline's construction activities, Virginia commenced an enforcement action against the MVP, asserting, *inter alia*, a myriad of violations of its 401 Certification conditions.[36]

Virginia's ability to develop and require conditions – and to give them teeth through the state's enforcement process – would be significantly undermined if the proposed regulatory changes were to occur. Many of the pipelines threats to water quality were expected (and have proven) to be from nonpoint sources – e.g., erosion from active land disturbances—that are outside the point source

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[32] 84 FR 44080, 44081-44082, Aug. 22, 2019.

[33] In addition to our opposition of EPA's proposed rule as it relates specifically to the water quality certification process in the Bay Watershed, CBF is opposed to policies that encourage projects that emit large quantities of harmful greenhouse gases. The region is already suffering from the effects of climate change, and these pro-fossil fuel policies will only irresponsibly exacerbate these problems. *See Summary for Policymakers of IPCC Special Report on Global Warming of 1.5 C approved by governments*, October 8, 2018, http://www.ipcc.ch/pdf/session48/pr_181008_P48_spm_en.pdf

[34] *See* Guidance Memo No. GM17- 2003, *Interstate Natural Gas Infrastructure Projects Procedures for Evaluating and Developing Additional Conditions for Section 401 Water Quality Certification Pursuant to 33 USC § 1341* ("401" Certification), Virginia Department of Environmental Quality, May 19, 2017 (identifying procedures for 401 Certification of large FERC-regulated natural gas pipeline projects, where activities in upland areas may affect water quality, for identifying appropriate, water quality protective conditions).

[35] *See* Issuance 401 Water Quality Certification No. 17-001 for Mountain Valley Pipeline, LLC, Dec. 8, 2017, https://www.deq.virginia.gov/Portals/0/DEQ/Water/Pipelines/MVP_Certification_Final.pdf.; Issuance 401 Water Quality Certification No. 17-002 for Atlantic Coast Pipeline, December 20, 2017 https://www.deq.virginia.gov/Portals/0/DEQ/Water/Pipelines/ACPCertificate122017.pdf

[36] *See, e.g., Paylor, et al. v. Mountain Valley Pipeline, LLC*, Case No. CL18006874-00) (Dec. 7, 2018, Henrico Cir. Ct.) (Virginia enforcement action against pipeline company for violations, inter alia, of requirement of compliance with state stormwater and erosion control rules made part of the project's 401 Certification), http://files.constantcontact.com/bfcd0cef001/7500afad-9981-4107-805e-28a0563b0fa6.pdf.

limitations currently proposed.[37] Moreover, the proposed rule would contradict the very purpose of Section 401 and give the federal agency – here, FERC – the ability to assess the appropriateness of Virginia's proposed conditions and to choose whether and when to enforce these conditions.[38] Yet FERC's statutory mandate is to further pipeline development, not to protect water quality; accordingly, it is imperative that the state agency have the ability to develop and enforce conditions tailored to meet state specific water quality concerns.

In addition to the continued examination of the viability of the MVP and the ACP, the Bay region will certainly face other potential pipeline projects as well as the types of permits that require state water quality certifications.[39] The Bay states must retain the ability granted to them under the Clean Water Act to ensure that these types of projects will not impair the health of the Bay and the waterways that feed into it.

V. EPA Has Not Met its Burden in Demonstrating Why Changes to the Water Quality Certification Regulations are Necessary.

Finally, we are deeply concerned that the EPA's motivation to abide by the directive of EO 13783, *Promoting Energy Infrastructure and Economic Growth*, does not comply with the requirements of the Administrative Procedure Act[40] in clearly explaining and identifying the basis upon which changes to rulemaking must be made. While an agency does have the authority to revisit and revise regulations in recognition of changing circumstances, "the forces of change do not always or necessarily point in the direction of deregulation."[41] There is a presumption "against changes in the current policy that are not justified by the rulemaking record."[42] We question EPA's justification for some of the approaches suggested in the proposed rule as merely trying to weaken the authority of states and tribes in order to meet the demand of the President's Executive Order. Such orders do not carry the same force of law as statues, including the Clean Water Act, which was passed by Congress and signed into law by the President.

VI. EPA Must Not Weaken the Section 401 Water Quality Certification Process.

We strongly urge EPA to reject its proposed rule as, if finalized, it would undermine the purpose behind Section 401 and the critical role of states and tribes in protecting water quality under the Clean Water Act.

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[37] *See* 84 FR 44080, 44120, August 22, 2019 (proposing to limit scope of certifying authority's conditions to discharges from point sources).
[38] EPA proposes that the "Federal agency shall be responsible for enforcing certification conditions that are incorporated into a federal license or permit." Proposed Rule, Section 121.9, 84 FR 44080, 44121, Aug. 22, 2019.
[39] As noted above, the types of Examples of these types of licenses or permits include, but are not limited to, "CWA section 401 NPDES permits in states where the EPA administers the permitting program, CWA section 404 permits issued by the Corps, hydropower and pipeline licenses issued by Federal Energy Regulatory Commission (FERC), and RHA sections 9 and 10 permits issued by the Corps." 84 FR 44080, 44085, Aug. 22, 2019.
[40] 5 U.S.C. § 551, *et seq.*
[41] *Motor Vehicle Mfr. Ass'n. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 42 (1983).
[42] *Id.*

Thank you for the opportunity to comment on these very important issues. Please let us know if we can answer any questions or provide additional information.

Sincerely,

Lisa Feldt

Lisa Feldt
Vice President of Environmental Protection and Restoration
Chesapeake Bay Foundation

[The referenced comments from the Attorneys General are available at https://oag.ca.gov/system/files/attachments/press-docs/Multi-State%20Comment%20on%20WQ%20Certs.pdf]

Senator CARDIN. I appreciate the Chairman's generosity in allowing us to put that in the record, as he is always very generous in listening to all views.

I want to follow up on Senator Duckworth's point about the practical effects, if we restrict the powers of the State under 401 certifications. We just completed, in Maryland, a rather lengthy process in regards to the Conowingo Dam and Exelon Corporation. The Conowingo Dam is the second largest producer of electricity, hydroelectricity power on the east coast of the United States, a critically important power source for our entire region.

But it is critical to what is happening with the quality of the water in the Chesapeake Bay. It is not just the immediate impact of what goes over the dam, but it is also the impact that it has on upstream and downstream.

There was a lengthy process in negotiating with the different stakeholders. On October 30th, Exelon and the State of Maryland announced an agreement just short of the 12 month limitation period.

There are pros and cons to the agreement that was reached. It does provide for Exelon to contribute some resources; there are some additional aspects in regard to how the migration of fish are handled, so there are some different aspects to this. There are a lot of stakeholders who felt that they should have been more aggressive, but they were able to reach an agreement, and it will help the Chesapeake Bay Program.

I don't think it would have been possible to do this in a 90 day period. Just too complicated to get done in a 90 day period. So, I am just wondering why we would want to restrict the State's leverage. The State had minimal leverage to start off with because the dam had to operate; it was critically important for electricity.

But they were able to utilize the different stakeholders and come together for a productive conclusion. But if we narrow the period of time, aren't we just making it virtually impossible for the States to utilize this opportunity for clean water?

The Chesapeake Bay Program is one I talk about frequently in this Committee. I guess my Committee members might be a little bit tired of listening to me, but since Senator Duckworth brought up the Great Lakes, I had to bring up the Chesapeake Bay.

The Bay Program was from the ground up. It started with the States and local government and local stakeholders. It wasn't a Federal Government mandated program; it was a State initiative program, with States taking leadership on it.

Now, if we say the States can't use the tools that they have in an effective manner, aren't we just handcuffing the States' ability to get things done?

In this case, Ms. Watson, it would not have been possible for the State just to deny the application, because we need the electricity. But wouldn't we be compromising the ability of the States to leverage for clean water in our region? The States, I think, know the local circumstances better than the Federal Government.

Ms. WATSON. Yes, Senator, absolutely, and thank you for your question. If you are limiting the amount of time that States have to make decisions, you are limiting the ability that States have to be able to reach those important deals, to work with the project proponent, and make sure that a project can go forward with the greatest possible protection for water. That is the system that is been in place for the last 50 years. It has worked very, very effectively.

Senator CARDIN. Governors, if you wish to comment, fine. You have to deal with a lot of different players in your States. Ninety days for something as complicated as a multi-jurisdictional body of water like the Chesapeake Bay is virtually impossible.

Mr. STITT. I don't think it would hamper your ability to go after bad actors, come up with a settlement. The 60 day proposal for Clean Water, our State does it in 60 days, so the 1 year timeline is just a reasonable time in scope. We think it is very reasonable for this Committee and the EPA to revise their rules.

The State of Minnesota has arguably more water than any other State. Oklahoma actually has more manmade lakes and shorelines. They are getting their permits done in 90 days, so just the reasonability of this time in scope, I don't think limits the States' ability to oversee water quality or go after a bad actor.

Senator CARDIN. It may be true for your State, but I would put you in the seat of Governor Hogan of Maryland and all the different stakeholders he has to deal with on these issues, and other States that he has to deal with.

Thank you, Mr. Chairman.

Mr. GORDON. Mr. Chairman, if I might respond, Mr. Chairman and Senator Cardin. I appreciate the fact that you brought this back to the topic at hand, which is the proper use of the Clean Water Act and Section 401.

As the former Chair of our State's independent environmental quality council, which is charged with not only making rules, but also is the first appeal body for any 401 permit that is granted in the State, I have experience with this program. I have to say that Wyoming also has multi-State jurisdictional issues. The Colorado River, for example, involves almost all the Southwest. The Columbia River also has several States on it.

We do our work within 60 days on average, but we are up to a year. I don't think that is unreasonable, and I think this particular Act actually does two things. One is, it talks about the scope, and as we make the scope larger, of course the job becomes longer. So, this is an attempt to, it seems to me, bring well needed reform to considering water quality impacts that are associated with a core permit or surface water issue.

Senator CARDIN. I will just make a final comment. We are not good examples here, but it is better if we have greater consensus among the Governors on the reform before it has brought here to Congress. I would like to have greater consensus among all of us.

This Committee usually works in a very consensus way, but it would have been better if we had more of the States in agreement as to how these reforms should take place.

Thank you, Mr. Chairman.

Senator BARRASSO. Thank you, Senator Cardin.

Before turning to Senator Capito, I am going to ask unanimous consent to enter into the record a letter from the Kansas Attorney General in support of today's hearing. Attorney General Kevin Schmidt states that S. 1087—he said, "would prevent future uses of Section 401 to deny development of constitutionally protected interstate commerce."

I would also like to enter into the record a court filing by eight States, including Oklahoma and Wyoming, who are opposing Washington's denial in court.

[The referenced information follows:]

STATE OF KANSAS
OFFICE OF THE ATTORNEY GENERAL

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November 15, 2019

Hon. John Barrasso
Chairman, U.S. Senate Committee on Environment and Public Works
410 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Chairman Barrasso:

Thank you for introducing and holding a hearing on S. 1087, the Water Quality Certification Improvement Act of 2019. This legislation is critical in reforming the scope of water quality certification to prevent the weaponization of these reviews to limit access to ports for the export of products disfavored by activists groups.

The Water Quality Certification Improvement Act of 2019 would clarify that states may only use these reviews under Section 401 of the Clean Water Act to consider the impact on water quality, and only take into account the discharges that would result from the federally permitted or licensed activity, not from other ancillary sources. The bill would also provide much-needed transparency to the review process, requiring states to publish their water quality certification requirements and make final determinations on whether to grant or deny a request in writing. The legislation would also provide clear timelines for the review process, requiring that applicants be informed within 90 days whether the states have received all of the necessary materials to process the certification request.

As you know, litigation is currently pending that accuses the State of Washington of unlawfully blocking the development of a coal export terminal, by refusing to grant a Section 401 water quality certification. The plaintiffs in that lawsuit have accused the state of refusing the permit based on the political disfavor of the coal industry, not on actual, local water-quality issues. Eight states, including Kansas and Wyoming, have weighed in on the case through an amicus brief supporting the plaintiffs. A copy of the states' brief is attached.

Landlocked states, such as ours, rely on access to coastal ports to export products to our global trading partners. While the current dispute is over the export of coal, if the status quo continues unabated, it is not difficult to foresee use of these tactics to block export access to other products, including agricultural commodities, based not on science, but on political activism.

Passage of S. 1087 would clarify the underlying issues in this case and prevent future use of Section 401 to deny development of constitutionally protected interstate commerce.

Thank you again for holding this hearing and for your leadership in securing passage of S. 1087.

Sincerely,

Derek Schmidt
Kansas Attorney General

THE HONORABLE ROBERT J BRYAN

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

LIGHTHOUSE RESOURCES INC.; LIGHTHOUSE PRODUCTS, LLC; LHR INFRASTRUCTURE, LLC; LHR COAL, LLC; and MILLENNIUM BULK TERMINALS-LONGVIEW, LLC, Plaintiffs, v. JAY INSLEE, in his official capacity as Governor of the State of Washington,; MAIA BELLON, in her official capacity as Director of the Washington Department of Ecology; and HILARY S. FRANZ, in her official capacity as Commissioner of Public Lands, Defendants.	No.: 3:18-cv-05005-RJB STATES OF WYOMING, KANSAS, MONTANA, NEBRASKA, NORTH DAKOTA, SOUTH DAKOTA, UTAH AND OKLAHOMA *AMICUS CURIAE* BRIEF IN OPPOSITION TO DEFENDANTS MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

The landlocked amici states, the States of Wyoming, Kansas, Nebraska, North Dakota, South Dakota, Utah and Oklahoma submit this brief to the Court for two reasons: (1) to show this Court that Plaintiffs Lighthouse Resources, *et al.*, and Plaintiff-Intervenor BNSF Railway Company have the right to present evidence in support of their allegations of economic discrimination at trial; and (2) to inform the Court of the real world harms imposed on

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landlocked states as a result of economic discrimination by coastal states. The landlocked states' motivation is simple and readily-acknowledged: they wish to protect their long-standing right to engage in commerce to fund vital social programs within their borders, like Kindergarten through 12th grade education. The landlocked states want to ensure that differently-minded coastal states cannot impose an economic embargo on commodities that politicians in those coastal states disfavor.

In their motions for summary judgment on the Dormant Commerce Clause issue, the Washington State officials and their coastal state allies seek something very different. They ask this Court to find that, because Washington does not have a coal industry, this Court must deny Lighthouse and BNSF the opportunity to present further evidence of improper economic discrimination at trial. Essentially, the Washington State officials and the coastal states argue that the Defendant Washington State officials could have made their environmental permitting decision in exactly the discriminatory and politically-motivated manner that Lighthouse alleges and, regardless of the evidence Lighthouse can produce at trial, this Court still would have to grant their motions for summary judgment. All because Washington State does not produce coal.

This cramped and unnatural reading of the Dormant Commerce Clause fails for several reasons. First, the notion that one can legally discriminate against someone else **because** they do not share the same attributes offends the most basic understanding of equality and fair play.

Second, while Washington State does not have a local coal industry, it does have a robust energy economy that competes directly with coal and that can benefit from protectionism. Third, Lighthouse has shown that the Washington State officials had (and have) every reason to discriminate against coal for political reasons. This broadens the concept of protectionism, but it is no less of a threat to the landlocked amici states. It is borne of discriminatory motives, and the logic behind the Dormant Commerce Clause shows that it is just as unacceptable. And fourth, based on the evidence already presented, Lighthouse has the

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right to further show at trial that Washington State's environmental analysis was improperly directed by political motivations in the context of the *Pike* balancing test. *See Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). Once done, this Court should view any supposed benefits that resulted from this politically-compromised process with skepticism when considering whether they justify the burden on commerce under the test described in *Pike*. For these reasons, the landlocked amici states ask this Court to deny the Defendants' motions for summary judgment on the Dormant Commerce Clause claim and allow the matter to proceed to trial.

II. BACKGROUND

Lighthouse operates an integrated coal production, transportation, and export business. As part of the business, Lighthouse owns and leases coal mining rights in Wyoming and Montana. It proposes to transport this coal by rail through an export facility in Longview, Washington, for shipment to Asia.

In 2012, Lighthouse began the Washington State permitting process for the export facility. Governor Inslee took office in January 2013. He has a long-documented opposition to fossil fuels, coal in particular, and their export through Washington State. Governor Inslee has reiterated his opposition to coal and fossil fuels numerous times since he took office, most recently when announcing himself as a candidate for President of the United States. The focus of his platform, which he says sets him apart from the other candidates, is his goal of "100% clean energy."[1] In short, coal has no place in Governor Inslee's view of the world, and it stands directly in the path of his political aspirations.

Lighthouse alleges that Governor Inslee and two officials he appointed have improperly prevented proper permitting of the export facility due to political opposition to coal. ECF_262.

[1] "Inslee wants 100 percent clean energy in Washington by 2045," *The Spokesman-Review*, Dec. 10, 2018, available at http://www.spokesman.com/stories/2018/dec/10/inslee-wants-100-percent-clean-energy-in-washingto/.

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Specifically, Lighthouse alleges that the Washington State officials modified the scope, contents, and conclusions of the state environmental impact statement that was meant to inform the permitting process. For example, the environmental impact statement includes activity outside Washington's state boundaries and, hence, not within the state reviewing agencies' jurisdiction. Lighthouse also alleges that the Washington State officials omitted or ignored facts in the environmental impact statement favorable to the export facility. In addition, Lighthouse alleges that the officials failed to follow the law and treated Lighthouse's permit applications differently than those for projects not involving coal. Finally, Lighthouse alleges that the Washington State officials used their official positions to influence the administrative process to ensure the denial of multiple permits and applications necessary for the export facility.

With regard to Lighthouse's Dormant Commerce Clause claim, Lighthouse has put forth sufficient evidence to support its argument of improper political influence and economic discrimination to proceed to trial. The landlocked amici states urge this Court to allow Lighthouse that opportunity because the Dormant Commerce Clause must protect states from discriminatory actions by other states.

III. ARGUMENT

A. The landlocked amici states support Plaintiffs' Dormant Commerce Clause arguments.

The States of this Union are not separable economic units. *Or. Waste Sys. v. Dep't of Envtl. Quality*, 511 U.S. 93, 98-99 (1994) (quoting *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 537-38 (1949)). "The essence of our federal system is that within the realm of authority left open to them under the Constitution, the States must be equally free to engage in any activity that their citizens choose for the common weal." *Dep't of Revenue v. Davis*, 553 U.S. 328, 338 (2008) (quoting *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 546 (1985)). The discriminatory actions of the Washington State officials interfere with the

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legitimate economic interests of the landlocked amici states. In effect, the Washington State officials are trying to impose their personal policy choices on the landlocked amici states. The officials seek to deprive the citizens of the landlocked amici states of their "equally free" right to engage in an economic activity they have determined is in their "common weal." As Lighthouse has shown and will further show at trial, this discriminatory behavior violates the Dormant Commerce Clause. ECF_262. The landlocked amici states support this effort.

1. This Court should not accept the argument that coastal states may openly discriminate against a commodity simply because they do not possess it.

The requirements of Rule 56 of the Federal Rules of Civil Procedure are straightforward. This Court can only grant the Defendants' motions for summary judgment if there is not a single genuine dispute over any material fact. Fed. R. Civ. P. 56. So, necessarily, the Washington State officials and the coastal states argue that Lighthouse and BNSF are completely incapable of presenting **any** meaningful evidence of discrimination at trial. As Lighthouse recently made clear, that position lacks merit. ECF_262 at 22-26.

Specifically, the Washington State officials and their coastal state allies argue they cannot offend the Dormant Commerce Clause because they lack a coal industry. ECF_227; ECF_237. Put another way, they argue that the Defendant Washington State officials lack the incentive to discriminate without a local industry to protect. As discussed below, Washington State absolutely has a local industry to protect, and the Washington State officials have abundant incentive to prejudice coal interests.

But first, consider where the coastal states' logic leads. If Washington State banned genetically-modified corn, it would then lack a genetically-modified corn industry. According to the Washington State officials and the coastal states, the State could then subsequently ban the transport of genetically-modified corn through Washington State by landlocked states without offending the Dormant Commerce Clause. As the Washington State officials and their

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allies say in their briefs: how can they possibly discriminate against an industry they do not possess?

This simplistic view of the Dormant Commerce Clause betrays exactly what Lighthouse is aggrieved by, and it alone shows why a trial is necessary. The Defendants' logic flies directly in the face of the entire concept of the Dormant Commerce Clause, which was borne of the belief that members of our federated union cannot discriminate against the economic interests of the other members of said union. *See, e.g., Or. Waste Sys., Inc. v. Dep't of Envtl. Quality of State of Or.*, 511 U.S. 93, 99 (1994) ("Discrimination" in Dormant Commerce Clause cases refers to "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter."). But, according to the coastal states, they have found a loophole.

In today's political environment, the "war on coal" and the "keep it in the ground" movements are well known. Governor Inslee is a self-proclaimed leader in this arena. These political movements are by no means unique. A vocal representative of one of the coastal states involved in this litigation already has called for, among other things: (1) a nationwide transition to 100% renewable energy by 2030; (2) a move away from non-organic farming; and (3) an end to air travel. How long will it be until a coastal state or a coalition of coastal states like the one in this case form an economic blockade based on another cause celebre, like banning genetically-modified grain? Or non-organic food? Or meat? The rhetoric from leading officials in these states shows that these are not empty hypotheticals. The logic advanced by the coastal states in this litigation, which would apply equally to these other scenarios, shows how slippery the slope may become.

The Washington State officials claim that they simply acted to protect the environment, in a manner allegedly unrelated to, but undeniably fully in accord with, Governor Inslee's "100% clean energy" platform. In so doing, the Defendants attempt to cloak themselves in a supposedly impenetrable justification of environmental protection. The coalition of amici

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coastal states concur by arguing that no environmentally-based decision can be challenged at trial under the Dormant Commerce Clause so long as the state that engaged in economic discrimination lacks the industry they chose to discriminate against. This logic is inconsistent with the entire reason the Dormant Commerce Clause exists. *See Minn. v. Clover Leaf Creamery Co.*, 449 U.S. 456, 471 (1981) ("If a state [decision] purporting to promote environmental purposes is in reality 'simple economic protectionism,' [a] "virtually per se rule of invalidity" applies).

And yet, the Defendants and their allies ask this Court to take the extreme step of denying Lighthouse the opportunity at trial to expand upon the evidence they have already provided. On the other side, Lighthouse, BNSF, Wyoming, and other landlocked amici states merely ask this Court to allow this dispute to benefit from the disinfectant qualities of an evidentiary proceeding.

2. Washington State has ample incentive to act in a discriminatory and protectionist manner.

The coastal states' argument also fails as a factual matter. By limiting the discussion to coal, they believe they have found a loophole to avoid trial. But that argument rests entirely on how the Washington State officials and the coastal states chose to define the industries in question. One could just as easily define the relevant industry here as fuel sources for the stationary production of electricity, which Washington State possesses in multiple forms, including hydroelectric power. Viewed in that light, the discrimination by the Washington State officials is certainly protectionist. The fact that the parties disagree on such a fundamental point confirms the need for a trial.

Alternatively, the question of protectionism can be viewed on a larger scale. The ongoing national dispute over energy sources is unquestionably political in nature. In past years, utilities sought out the most cost-efficient fuels to power their electricity-generating facilities. More often than not, the most cost-efficient fuel was coal. But, increasingly, power

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producers, under political pressure, are opting for more expensive fuel sources that are viewed more favorably in their individual states. More and more, in the world of electricity generation, so-called social factors drive the choice in fuel sources rather than cost-effectiveness. This creates a business environment less affected by economic protectionism and more affected by politicians. When Governor Inslee calls for "100% clean energy," his officials are less motivated to prop up local industry and much more motivated to ensure that their chosen sources of fuel "prevail" over those sources Governor Inslee and his officials disfavor. That may not look the same as old-school protectionism, but it is borne of similar discriminatory motives. And the logic behind the Dormant Commerce Clause says it is just as unacceptable. *See, e.g., Or. Waste Sys., Inc.*, 511 U.S. at 99.

Governor Inslee and his officials oppose energy sources that emit air pollutants as part of his "100% clean energy" platform, with coal at the top of the list of disfavored fuel sources. They favor energy sources without air emissions, like hydroelectric power, an energy source that is abundant in Washington State. Governor Inslee has called for the State to eliminate coal as an energy source by 2025.[2] Denying coal companies the ability to export coal unquestionably advances Governor Inslee's agenda and provides competitive advantages to non-coal sources of energy, thereby further advancing his agenda. Improperly influencing a permitting decision to disadvantage the coal industry might not, as a technical matter, "protect" a particular corporation in Washington State, but it unquestionably gives an advantage to energy sources other than coal, which is precisely Governor Inslee's larger purpose. Allowing the Washington State officials to escape trial based solely on a lack of a domestic coal industry, when the State has a robust energy industry, and where the Washington State officials have every incentive to discriminate against coal, would ignore the goals embodied in the Dormant Commerce Clause on a technicality that misses the true issue at play.

[2] "Gov. Inslee's new climate plan nixes coal power by 2025," Dec. 10, 2018, MYNorthwest.com, available at http://mynorthwest.com/1213183/inslee-climate-change-plan-coal-power/.

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3. Lighthouse must have the opportunity to demonstrate at trial that the actions of the Defendants do not survive the *Pike* balancing test.

Irrespective of the arguments above, Lighthouse can also prevail at trial by showing that the burdens imposed by the permitting decision on commerce are "clearly excessive in relation to the putative local benefits." *Pike*, 397 U.S. at 142. Based on the evidence already provided, Lighthouse has the legal right to show at trial that the permitting process was improperly influenced by political and discriminatory motives. *See* ECF_262 at 26-44. At trial, this Court should reject any supposed benefits that resulted from this politically-compromised process. If the permitting process was as compromised as Lighthouse alleges and intends to show at trial, any remaining "benefit" from the permit denial, if indeed there is one, cannot not justify the burden on commerce. *See id.* That would be an issue to resolve at trial, something the Washington State officials seek to avoid.

Based on the evidence submitted, Lighthouse and BNSF have the legal right to make their case at trial. The Defendants and their allies ask this Court to deny Lighthouse and BNSF that opportunity. There is a simple and sensible path available for this Court. Allow Lighthouse and BNSF to make their case at trial, and let the chips fall where they may. Wyoming and the other landlocked states urge this Court to provide Lighthouse and BNSF this basic opportunity.

B. <u>Empowering coastal states to discriminate against landlocked states will cause significant harm.</u>

This case is not the intellectual exercise that the Washington State officials and their coastal state allies try to portray. The landlocked amici states are currently suffering real-world economic harm due to the discrimination at issue. And a decision by this Court to empower the coastal states to discriminate at will against industries that do not operate within their borders will cause significantly more harm.

The harm caused to Wyoming is one example of how this type of economic discrimination can detrimentally affect a landlocked state. During the 2007 to 2016 timeframe, coal mines in Wyoming collectively generated close to $5,000,000,000 in severance and ad

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valorem taxes to the State. ECF_81-1 at ¶7. In addition, coal mining on Wyoming-owned land provided over $61,000,000 in revenue in fiscal year 2017 alone, which funds K through 12 education. ECF_81-2 at ¶4. While these sums may not impress California or New York, in a State of 600,000 citizens, they are absolutely critical to provide basic social services.

Wyoming tax revenues from coal mining benefit state programs, cities, counties, public schools, and institutions of higher learning. *See* Wyo. Stat. Ann. §§ 39-13-111; 39-14-801. The tax revenue also pays for water and highway infrastructure projects and funds the State's revenue accounts, including its permanent mineral trust fund, permanent trust fund reserve account, general fund, and budget reserve accounts. *Id.*

It is beyond dispute that domestic demand for coal is decreasing. To continue to fund the programs discussed above, Wyoming is taking active steps to develop its natural resource revenue base by working with overseas partners to develop markets for coal. For example, on July 25, 2016, Wyoming entered into a five-year Memorandum of Understanding (MOU) with the Japan Coal Energy Center. *See* ECF_81-3. The MOU contemplates the parties' cooperation in the "facilitation of coal exports and sales, which may include the development of new USA coal export and Japanese coal import terminals, public support to existing export facilities together with establishing sales contracts for Wyoming coal[.]". *Id.* at § 4(d). A blockade by the coastal states directly threatens Wyoming's efforts to further develop these types of efforts.

Like Wyoming, Montana has a significant interest in being able to export coal, which is abundant in eastern Montana. Coal is one of the few natural resources available as a reliable source of revenue for the State, Native American tribes, and the State's many subdivisions. ECF_78-1 at 8-9. While coal is abundant in Montana and is the only mineral that is routinely marketed through sales contracts of many years' duration, "coal in Montana is subject to regional and national demands for development that could affect the economy and environment of a larger portion of the state than any other mineral development has done." Mont. Code Ann. § 15-35-101(1)(a-b), (d). Accordingly, restrictions on coal exports like the

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one at issue here hinder Montana's efforts to maximize returns from this tax.

As in Wyoming, Montana relies on coal-related tax revenue to provide critical services. Montana's Constitution requires the deposit of 50% of the coal severance tax revenue into a permanent Coal Severance Tax Trust. ECF_78-1 at 9. The intent of this requirement is to provide jobs, improve infrastructure, promote economic growth, and "enhance the quality of life and protect the health, safety, and welfare of Montana citizens." *See* Mont. Code Ann. § 90-6-702. The Coal Severance Tax is the second-highest source of natural resource tax revenue in Montana. It provided between $53,000,000 and $59,000,000 in tax revenue between 2013 and 2016. ECF_78-1 at 9. Furthermore, Montana levies a flat tax of five percent against the value of the reported gross proceeds for most coal mines, which is then distributed proportionately to the State and to those taxing jurisdictions in which production occurs. Mont. Code Ann. Title 15, Ch. 23, Part 7. In many counties, this tax redistribution is the primary source of funding for county obligations. ECF_78-1 at 10.

When other components of Montana's economy suffer, coal tax revenue provides a reliable source of funds for the continuing maintenance and modernization of Montana infrastructure, economic development and schools. *Id.* Like Wyoming, Montana's responsible resource development opportunities are limited. The domestic market for Montana coal has been in decline for years, with plants in the various states either retiring, planning retirement, or converting to natural gas. *Id.* Accordingly, preventing Montana from being able to export coal to foreign markets is causing and will continue to case the State significant harm.

As Lighthouse showed in its response brief, the lack of the coal export facility in question could cost Wyoming, Montana, Colorado, and Utah "over 3,900 jobs annually" and "$18 billion in gross domestic product." ECF_262 at 3, 27. And it is not just coal interests that are put at risk by discrimination by coastal states. The list of commodities that the coastal states could choose to target is nearly endless. Kansas, which does not produce coal, provides a useful example. In 2017, foreign exports of agricultural products from Kansas totaled

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$3,630,000,000. Ex. A at ¶4. Among the top destinations for Kansas's corn, wheat, and other products were Japan and South Korea, markets accessed via the west coast. *Id.*.

Unsurprisingly, the situation is much the same in Nebraska. In 2017, Nebraska's exports of agricultural products totaled $6,400,000,000. Ex. B at ¶4. Nebraska exports more than $1,000,000,000 in beef and $1,000,000,000 in corn. *Id.*. Three of Nebraska's top export destinations are Japan, South Korea, and China. *Id.*. Access to west coast export terminals is critical to Nebraska's ability to deliver food, feed, and fuel to its customers. *Id.* at ¶5.

In short, without the ability to export agricultural products through a coastal state, states like Kansas and Nebraska would suffer significant harm. Ex. A; Ex. B. And with high profile individuals already proposing bans on things as fundamental as air travel, a ban on genetically-modified corn or non-organic wheat is all too easy to imagine.

IV. CONCLUSION

The Washington State officials ask this Court to find that there is not a single issue of material fact in dispute regarding Lighthouse's Dormant Commerce Clause claim. Lighthouse and BNSF have already refuted that position. The landlocked amici states ask this Court to deny the Defendants' pending motions for summary judgment and to allow this case to proceed to trial.

If this Court does not do so, and accepts the argument that the Dormant Commerce Clause does not protect landlocked states from politically-based discrimination by coastal states, the economic picture for the so-called "flyover states" is bleak indeed. Such a decision would create a nation where the coastal states can impose their political will on the landlocked states. That situation is untenable, and the Dormant Commerce Clause exists to prevent it.

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DATED: March 11, 2019

BULLIVANT HOUSER BAILEY PC

By */s/ Michael A. Guadagno*

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CERTIFICATE OF SERVICE

I hereby certify that on March 11, 2019, the foregoing was served by the Clerk of the U.S. District Court for the Western District of Washington, through the Court's CM/ECF system, which sent a notice of electronic filing to all counsel of record.

/s/ Michael A. Guadagno
Michael A. Guadagno, WSBA #34633

4835-4290-3946.1

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EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

LIGHTHOUSE RESOURCES, INC., *et al,* Plaintiffs, v. JAY INSLEE, *et al,* Defendants.	Case No. 3:18-cv-05005-RJB

DECLARATION OF SUZANNE RYAN-NUMRICH

I, Suzanne Ryan-Numrich, hereby declare as follows:

1. I am the International Trade Director for the Kansas Department of Agriculture ("KDA"). I have been employed by KDA since March 2015. As part of my duties at KDA, I am responsible for assisting Kansas farmers, ranchers and agribusinesses in marketing their products and services in export markets.
2. I have personal knowledge and experience to understand the importance of exports to the Kansas economy and the need for unfettered access to domestic and international markets.
3. I have lived and worked in two international markets promoting free and fair trade with U.S. farmers, ranchers and agribusinesses. In total, I have over

twelve years' experience in international marketing along with B.S., M.S. and M.B.A. degrees.

4. Kansas, a landlocked state, benefits from access to ocean ports by allowing our state to competitively and reliably serve global markets for corn, oilseeds, sorghum, wheat, as well as other agricultural commodities. In 2017, Kansas exports totaled $3.63 billion of agricultural commodities to 90 countries worldwide. Top export destinations included Mexico, Japan, Canada, Nigeria and South Korea.

5. There are many modes in which a Kansas commodity can travel before reaching its destination: truck via the national highway or interstate system, railcars via the rail system, barges via the river system, and ocean vessels via the extensive ocean transportation network. In 2011, 80 percent of U.S. agricultural exports (146.5 million metric tons), and 78 percent of imports (40.7 million metric tons) were waterborne (Census Bureau, U.S. Department of Commerce, and PIERS).

6. It is my opinion that each state should have the right to market their commodities without interference from another state. Many of our export markets are tremendously price sensitive. Unexpected increases in transportation patterns and costs would most definitely result in the loss of

competitiveness and ruin our reputation as one of the most reliable suppliers of agricultural commodities.

7. If denied unfettered port access, implications would be long-term, financially devastating and create unnecessary trade imbalances. Trade is built on relationships, and relationships take time to cultivate and grow. Damages to trade relationships cannot be repaired overnight. A decrease in agricultural exports would have significant impact on the Kansas economy. The 5-year average economic contribution of the agriculture, food, and food processing sectors is roughly $63.8 billion per year or 42.3 percent of the Kansas economy.

I declare under penalty of perjury that the foregoing is correct. Executed on this 18th day of February, 2019, at Manhattan, Kansas.

Suzanne Ryan-Numrich

Suzanne Ryan-Numrich

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

LIGHTHOUSE RESOURCES, INC., *et al,* Plaintiff, v. JAY INSLEE, *et al*, Defendants.	Case No. 3:18-cv-05005-RJB

DECLARATION OF STEVEN WELLMAN

I, Steven Wellman, hereby declare as follows:

1. I am the Director of the Department of Agriculture for the State of Nebraska. I have served in this position since December, 2017. I am also a third generation family farmer with a deep appreciation for producing food, feed, and fuel for our domestic and international markets. I have served on the Nebraska Soybean Association and the American Soybean Association boards of directors, and I served as President of the American Soybean Association in 2012. Additionally, I served four years on the United States Department of Agriculture/Foreign Agricultural Service Agricultural Technical Advisory Committees for trade in grains, feeds, oilseeds, and planting seeds. As the Director of the Nebraska Department of Agriculture (NDA), I engage regularly with our growers, government entities, and businesses interested in exporting Nebraska products and services.
2. I have personal knowledge and experience to understand the importance of exports to the Nebraska economy. My experience and expertise gained from growing grains and livestock combined with many international trade missions to promote agricultural sales

demonstrate the importance of an efficient infrastructure to move our products for domestic and international markets. This background and knowledge has been gained through over 58 years on our family farm and over 25 years of working with growers' associations and the NDA.

3. Nebraska is a leading producer of many agricultural products in United States. Nebraska leads the nation in cattle on feed, commercial red meat, popcorn and Great Northern bean production. Total cash receipts from all Nebraska farm commodities in 2017 was $21.3 billion

4. In 2017, Nebraska exports of agricultural products totaled $6.4 billion to markets in all parts of the world. Our leading export commodity was soybeans. For the fourth year in a row, we exported more than $1 billion of beef. Exports of corn also exceeded $1 billion. Large quantities of pork, ethanol, distillers grains, wheat, dry edible beans, dairy products, and eggs are also exported every year. The top five export destinations are China, Mexico, Japan, South Korea and Canada.

5. Due to Nebraska's central location in the United States, our farmers, ranchers, and agri-businesses need access to ocean ports to serve our global customers. The national highway and interstate system, access to two Class I railways, and the waterway barge system serve our transportation needs to the ocean ports. Access to ocean ports and vessels are vital to completing delivery of the food, feed, and fuel to our export customers.

6. Agriculture is the largest segment of Nebraska's economy. Denying access to ports and other methods of transportation used in interstate and international trade will create additional costs, limit trade opportunities, and negatively impact Nebraska's economy. Disrupting established trading partnerships and relationships by denying access to ocean ports would have both an immediate and long term impact on the State of Nebraska. Our global customers need a reliable, consistent supply of agricultural products.

I declare under penalty of perjury that the foregoing is correct. Executed on this 6th day of March, 2019 at Lincoln, Nebraska.

Steven Wellman

Senator BARRASSO. Senator Capito.

Senator CAPITO. Thank you, Mr. Chairman, and thank you for scheduling the hearing on our bill, the Water Quality Certification Improvement Act and efforts to improve implementation of 401 broadly. I am very appreciative of that.

I would like to ask a process question first, Governor Gordon. In the process, the State permits under the 401, but once that permit is granted, there are all kinds of other Federal agencies that then weigh in on the permit, like the Corps, Fish and Wildlife. Can you flesh that out a little bit for me? If you don't know the details, I can write it in a written question.

Mr. GORDON. Thank you, Mr. Chairman and Senator Capito. You are correct. Section 401 is specifically about water quality. It is not intended to be a catch all for all environmental regulation, and I think it is important that we keep—and I think that is what the value of this particular draft bill is, is to make sure that we keep it on topic of water quality. Because as you point out, there are many other agencies that weigh in beyond that, from the Corps of Engineers, to Fish and Wildlife Service, and others. So it is an extensive process that really has to be done both on a State and a Federal level.

Senator CAPITO. Right. So I would like to point out that this legislation does not violate our States' rights to protect the quality of their water. Everybody here on the dais and in the audience and probably across this great country are just as invested in water quality and clean drinking water as the next person.

But what we found in a State like West Virginia is, we exert our right under the 401, and we get sued by other external groups to try to prevent the direction that we want to go. Maybe that is not the direction that Washington State wants to go, but it is the direction that we as West Virginians want to go, and so that is very frustrating.

So I guess in the grand scheme of things, to both Governors, does this legislation in any way prevent you from continuing to ensure water quality consistent with the Clean Water Act?

Mr. GORDON. Mr. Chairman, Senator Capito, I do not believe it does. As I say, I have extensive experience with the State's regulatory apparatus, having served on the environmental quality council and having actually prosecuted several examples of these permits being issued and being contested. Never did I see the State's opportunity to regulate appropriately interfered with.

As I have mentioned before, I think States have multiple rights, and one of them is certainly the right to commerce. That, I think, is something being precluded as we see the creep of 401 to include other things.

Senator CAPITO. Governor Stitt, do you have a comment on that?

Mr. STITT. No, I do not think it limits our ability as a State to regulate our water quality. I just want to address the States' rights issue. Today, we are talking about pipelines, and we are talking about exporting coal. But tomorrow, it may be exporting agricultural goods, or it might be exporting beef. I think that is exactly——

Senator CAPITO. We might be exporting energy generated by a solar panel.

Mr. STITT. It could be, that is correct. We could. I think we have talked enough here, we are so proud of Oklahoma being the pipeline capital of the world, and yet we have given you the facts on our water quality. This is really an attack on States' rights to be able to export their assets, and that is where one State's rights, where does it impinge on another State?

Senator CAPITO. Right. As Governor, obviously you have stated the robust production of natural gas and oil. My State of West Virginia is new to the natural oil. We are not new to the natural gas business, but we are new to the proliferation through the Marcellus and Utica Shale. I think it is rather ironic that we have two major pipelines now stopped because of permitting issues.

But we also look where we are situated in this country, where we could be exporting our gas to New York State and to the Northeast to replace what I think is one of the dirtiest fuels around, and that is fuel oil. I am not sure that we are into genuine arguments here in terms of how to weigh the cost and benefit environmentally and also economically at the same time.

I don't know, Governor, if you had a comment on that.

Mr. STITT. I think that is exactly right. The hypocrisy of having a Russian oil tanker sitting in the Boston Harbor, transporting oil and natural gas——

Senator CAPITO. It had been to Tobago, too. Remember, it came down from London to Tobago, and back up to Boston. How much carbon footprint is that?

Mr. STITT. That is right. Transporting oil and natural gas through pipelines is the safest way to do it, versus truck or train or obviously by ship. We love it. We think it is the right thing, and this is just about time and scope and clarity around 401. That is why we are supportive.

Senator CAPITO. Thank you.

Senator BARRASSO. Thank you, Senator Capito.

Senator Merkley.

Senator MERKLEY. Thank you, Mr. Chairman.

Ms. Watson, how many years did it take for the design to be developed for the Millennium Coal Terminal?

Ms. WATSON. That was, of course, several years in the making, Senator, and I am not sure that the designs are completed yet.

Senator MERKLEY. So it took many, many years for the company to figure out how it has going to address different issues, design the details. In that context, do you feel it was unreasonable for the State to only have a few days to be able to evaluate a design that took many years, and as you have just mentioned, isn't actually complete yet?

Ms. WATSON. Yes, absolutely, Senator. One of the problems in particular with that project is the company did not come forward with sufficient information to show how it was going to mitigate against water quality impacts, even at that point.

Senator MERKLEY. So you had to do an evaluation based on not even the company willing to provide the information?

Ms. WATSON. That is correct; that was the problem.

Senator MERKLEY. I understand you have had 11 quality based reasons or concerns that you were expressing, and the company

never bothered to basically lay out how it was going to address these 11 issues.

Ms. WATSON. That is correct, Senator. The company did not come forward with information showing how it would prevent those water quality issues.

Senator MERKLEY. Governor Gordon, do you think it is reasonable that you as a Governor should have to respond to the company that is not going to give you the information that you need?

Mr. GORDON. Thank you, Mr. Chairman, Senator Markey. I think your question is——

Senator MERKLEY. Senator Markey isn't here, but I am here, and I would like to hear your response.

Mr. GORDON. I am sorry. Pardon me.

Senator BARRASSO. People confuse Markey and Merkley all the time. It's like Crapo and Carper. We have the same thing.

[Laughter.]

Mr. GORDON. Senator Merkley, thank you. Your question is about reasonableness of a short time scale.

Senator MERKLEY. No, it is trying to respond the way that the power that has been delegated to your State when the company hasn't provided the basic information that you need.

You don't need to give me a lengthy response. I would think any Governor would be concerned. If you are not concerned, I think many other Governors would be concerned about having to respond when they haven't gotten the basic information.

Mr. GORDON. Senator Merkley, if I may respond.

Senator MERKLEY. You have to be very quick.

Mr. GORDON. I think the issue is that the Millennium Bulk Terminal actually presented information from Centralia, Washington, on Hanford Creek had exactly the same condition, very similar, and presented their water quality information, which was approved in 2016, 1 year before the prejudicial dismissal.

Senator MERKLEY. Let me turn to an Oregon project that was mentioned. That is the LNG potential terminal in Coos Bay, Oregon.

The pipeline crosses 485 bodies of water, 7 lakes, 326 waterways, 150 wetlands. I can't see how the State of Oregon can even get out to look at the plans for those locations in 60 days.

These things vary so much. You might have a permit that requires crossing one creek, or near one lake. But in this case, you are talking about, well, close to 500 bodies of water, an extraordinarily complex undertaking.

Do you think 60 days is reasonable for the State to be able to even get out and identify and evaluate the concerns for water quality in all those locations?

Mr. GORDON. Is that question for me?

Senator MERKLEY. Yes.

Mr. GORDON. Sixty days is probably unreasonable. One year is certainly reasonable, and I think with pre-consultation, there is plenty of opportunity for getting that information correct.

Senator MERKLEY. OK. Well, thank you for your perspective. It looks very different to the State where the impacts are going to be on the ground. Our citizens want a thorough evaluation of the impacts.

We value our trout, we value our salmon, we value our crabbing industry, we value our salmon industry. We value all of our offshore activities that are affected, as well as our instate waterways affected by the pipeline.

I was very struck by, when the law was initially written, there was a bipartisan consensus, and it said it right in it, that this recognizes the primary responsibility of the States. This has all the earmarks of an assault on State rights with the heavy hand of Federal Government and Federal lobbying. I for one am going to stand up for the people of my State, defend their waterways, and especially when the company won't even provide the basic information needed to evaluate it.

These projects involve trenching, blasting, drilling, damming, and 500 or so waterways impacted. There is no way that that can be done in such a short period of time. There is no way it can be done when the company doesn't even provide the basic information to begin with.

So with that, I stand with the people of Oregon, who want to defend their waterways, and it looks very different, perhaps, than the perspective on your end of the project.

Thank you, Mr. Chairman.

Senator BARRASSO. Thank you, Senator Merkley.

Senator Cramer.

Senator CRAMER. Thank you, Mr. Chairman.

Thanks all of you. I have never confused for Senator Merkley or Markey, although just now, someone could be confused because I think what you are hearing from the two sides of the dais get right to your point, Governor Gordon. We have to find balance, identify scope and creep, and I think we are all trying to do exactly that: find balance.

What is that balance between the State's right to its own environmental protections and its resources, and a State's right to access to interstate commerce and global commerce?

I come from North Dakota, a State like yours, where we are landlocked, right in the center of the North American continent, and are rich in resources that the country and the world wants and needs. Striking the balance, I think is what the bill does.

One of the things that strikes me, and I am just going to opine for a minute, because listening to all this has been fascinating and encouraging. I hope people watching it are encouraged to see an intellectual discussion of peers and experts about, what is the right balance, because I am encouraged by it.

When Congress isn't very prescriptive, it allows the bureaucracy to write the rules, and that almost never turns out well, from my perspective. It doesn't protect States' rights either to regulate themselves or their resources in order to interstate commerce. So I appreciate us coming back to the scope of 401, what that means, what that section provides in terms of clarity or lack thereof in authority.

I am going to get back to the Millennium Project, because I think it is an interesting one, because it has similar to issues that we in North Dakota have had with the State of Washington's zeal, if you will. So in regard to the Millennium Project, the State of Washington denied the 401 permit, despite the State's own EIS, which

stated "there would be no unavoidable and significant adverse environmental impacts on water quality." That is the State's EIS.

So it was not a surprise, in my view, considering that the proposed terminal was only a few miles from the existing Port of Longview, and that moves millions of tons of cargo, as you know, each year. But I thought it interesting the State of Washington proceeded to deny the water quality certification under Section 401 for nine reasons that had nothing to do with water quality. It doesn't mention water, and some of them, it is a very far stretch.

So, Governors first, both of you oversee DEQs, both of you have spoken a little bit to this, but when you get a DEQ permit, and of course, you have great experience in this, or a 401 permit application, do you consider a lot of things outside of water quality?

And maybe start with you, Governor Stitt, since you have the background in this.

Mr. STITT. We look, if there's endangered species, we look at that. We look at the groundwater, we look at any kind of impact. We look at the maps, we look at the scope of the project. We make sure that it complies with the Clean Water Act and our own State water standards. But we keep it to—we don't try to play pick winners and losers, we try to keep with the Clean Water Act, and move it forward.

Like I said, we do that in 60 days, so putting parameters of 1 year, we think, is very reasonable to bring the scope, which you said very well, back to the real issue of 401, which is water quality in the State.

Senator CRAMER. Governor Gordon.

Mr. GORDON. Mr. Chairman, Senator Cramer, I think you are absolutely on point. As I was thinking about this and a similar opportunity that Wyoming might be presented with, Wyoming is the home of the largest wind farm in the country. That wind farm is going to require a stormwater quality permit. The customers for that wind farm are going to be all over the Southwest, and including Oregon.

If we were to fancifully apply 401 as Washington did, we might deny a stormwater quality permit with prejudice for the wind farm with the idea of saying that we are not going to supply customers in the West.

Of course, we wouldn't do that, because we would work with the proponents of the wind farm to make sure that the water quality impacts were addressed, only the water quality impacts.

Senator CRAMER. With regard to moving oil, for example, Governor Stitt, North Dakota is, of course, the second largest oil producing State in the country, farther from markets, even, than Oklahoma. But your neighbors, your port neighbors, include Texas and Louisiana. Do you see a difference in how they apply 401 to, say, a State like Washington or Oregon that may apply it differently? Does it make sense that we would have a little more of a uniform application?

Mr. STITT. We believe so. Obviously, there are pipelines running through Oklahoma, from your State down to our State. We are the southern leg of the Keystone. We have access to Louisiana. We are building natural gas pipelines to transport LNG down to the ports in Louisiana.

Obviously, we have direct access to the Houston refineries. So I think Texas and Louisiana are interpreting the rule properly. They are following their water standards just like we ask every State to do. This is really about making sure that we don't let certain States politicize this issue for their own biases, and then harm the assets of one State. That is really what it is about.

Senator CRAMER. We think of it as weaponizing.

Thank you, Mr. Chairman.

Senator BARRASSO. Thank you very much.

Senator Van Hollen.

Senator VAN HOLLEN. Thank you, all of you, for your testimony here today.

Senator Cardin also comes from my State of Maryland, and he covers some of the territory I mentioned.

We recently had a back and forth in Maryland with Exelon Company regarding the Conowingo Dam, which is a dam on the Susquehanna River. I believe that if the EPA knew proposed regulations were in place or this legislation were in place, the State of Maryland would not have been able to reach the agreement it did with Exelon, putting aside the merits of that particular agreement, because this legislation would have undermined the State's leverage in that negotiation.

That is not just my view. That is also the view of the State of Maryland's Secretary of Environment, Ben Grumbles, Secretary of Environment to our Republican Governor, Governor Larry Hogan. Secretary Grumbles says the Maryland Department of Environment believes that Maryland's program could be further hindered by the proposed rules, similarly, the legislation.

Ms. Watson, one of the issues that he raised, Secretary Grumbles, regarded the change in the definition of discharge. Could you talk about that in this context?

As Secretary Grumbles points out in this letter, CWA Section 401 requires certification for any federally permitted activity that may result in a discharge to navigable waters. While it is well established that the term discharge is broader than the term point source, the proposed rule limits State certification review to discharges from a point source.

Could you elaborate on that concern and talk about how that would impede States like the State of Maryland from taking action to protect our water bodies, including the Chesapeake Bay?

Ms. WATSON. Yes. Thank you for your question, Senator. As things stand now and as they have stood for the last 50 years, States have been able to look at the entire federally permitted activity to make sure that the activity will not cause water pollution. The U.S. Supreme Court affirmed that understanding in the 1994 case PUD No. 1.

So that has been the way States have implemented 401 for the last 50 years. EPA is not proposing to do, and what this legislation would do, is skinny down what States can actually look at, so that you are looking at just a very narrow discharge into a navigable water.

States couldn't protect their groundwater. States couldn't protect from construction stormwater. States couldn't protect with sedi-

mentation standards, with erosion standards, for Endangered Species Act standards, couldn't protect tribal fishing access.

So there are all kinds of water quality protections that are protected today and have been for the last 50 years that would be on the chopping block as a result of this rule.

Senator VAN HOLLEN. I appreciate that, and that is exactly what gave rise to this concern.

Just to the Governors, you heard the concerns expressed. Would you like to change the regulation so that you could no longer use your permitting authority for groundwater protection, sediment issues, and the other issues that were raised by the other witness?

Mr. GORDON. Mr. Chairman, Senator, I don't believe that is what is in front of us today. I would read that differently.

I can't speak to the case of Maryland. I am from Wyoming, but having served in a regulatory capacity for the State prior to being treasurer and now Governor, and having been a citizen who has worked on these issues since the 1980s, I have to say I don't see this as any diminishment of the States' opportunity to regulate waters within its boundaries.

I do see it as a creep to take in issues like rail safety, greenhouse gas emissions, noise, that are not pertinent to water quality issues.

Senator VAN HOLLEN. So you would have no objection then, to amend the legislation in a way that made crystal clear that nothing about this changed a State's ability to regulate discharges? You would support that?

Mr. GORDON. Mr. Chairman, Senator, I believe the Clean Water Act was about protecting water, and the 401 provision of that Act allowed States to control the water within their boundaries.

Senator VAN HOLLEN. So you don't think that this new proposal or this legislation impacts that in any way? You don't believe that?

Mr. GORDON. I think it narrows it and recenters it on the issue of water quality and allows States the opportunity to regulate those.

Senator VAN HOLLEN. So you disagree with the testimony. But if clarification was required, then you would support that, right, to not diminish that State's authority?

Mr. GORDON. I would, clarification, I believe, is in order. I would hope it doesn't diminish the State's authority.

Senator VAN HOLLEN. I mean, you can understand there's a little confusion here, because States usually want to have authority to fully protect their waters and their environment. Yet this proposal essentially gives the Federal Government ultimate veto and decisionmaking authority and ability to second guess Governors, and you are OK with that, I take it?

Mr. GORDON. Mr. Chairman, Senator, I believe States have authority to regulate waters within their boundaries. That I stated emphatically over and over again. I also believe that States have a constitutional right to conduct commerce, and if other States use that tool, the 401 permit, to impede the commerce of other States, then I think that is unconstitutional.

Senator VAN HOLLEN. There's obviously a fundamental disagreement as to what this regulation and legislation does, and it seems to me that if there's that much ambiguity, that before we proceed

in either way, we would want to make it very clear what the impact is. I hope we can all agree on that.

Thank you, Mr. Chairman.

Senator BARRASSO. Thank you very much.

Senator Sullivan.

Senator SULLIVAN. Thank you, Mr. Chairman, and I want to thank the witnesses for their testimony and being here on an important issue, certainly an important issue.

In my State, the great State of Alaska, we have successfully run a Section 401 program for quite some time.

But I want to go into the question, particularly for our two Governors, who have a lot of experience in this area, where there seems to be kind of a movement to focus on stopping projects from moving forward not based on clean water, but really trying to delay or kill a class of projects. In particular, something that matters to my State, I think it matters to your States, are pipelines.

Kind of ironic, because the modern day pipelines—Keystone for example—created this hysteria when we all know that the studies show that it is actually much more safe to move energy products via pipeline than it is via rail. Yet for some reason, certain States have really focused, not again on clean water authority, but just a class of projects, pipelines, to kill them.

Let me just give you examples I am sure you are familiar with. The Constitution Pipeline in New York—prime example—where the Governor of New York is impoverishing his own citizens by delaying any ability to move natural gas across the State. The U.S. Chamber estimated that the delays to that project is close to $4 billion in economic output and close to 24,000 jobs. So, that seems, to me, an issue.

Similarly, in Massachusetts, the unwillingness to permit a pipeline for natural gas has created the ironic situation where, as opposed to people in New England having gas from Americans, American gas, by American workers, they are importing LNG from Russia, our geopolitical foe that trashes the environment when they produce gas.

But there you have it, two examples of Section 401 that are not focused at all, in my view, on protecting the water, but some kind of fundamental, irrational, in my view, opposition to a class of projects, in this case, pipelines.

Can you two, both the Governors, expand upon this, or just give us any insights on how we should look to prevent this kind of focusing on just projects themselves, a class of projects, versus the intent, which is to make sure all States have clean water and clean air?

In my State, we care more about our water and air than anybody, than anybody in the EPA, anybody. And by the way, we have some of the cleanest water and cleanest air in the world. We care about that.

But this movement toward blocking things, it really hurt the whole country, not just their own States. I think it is something that Governors in particular can speak to, and I would welcome your views on that, and how we can look at Federal law to maybe prevent those kinds of approaches that really, these Governors are

harming their own citizens, but they are harming the rest of the country as well.

Mr. STITT. I totally agree with you. I think that was very, very well said. First point I would like to add to that is that Oklahoma is—you missed it, you weren't here earlier, but we talked about we are the pipeline capital of the world. We have more pipelines running through Oklahoma actually surrounding——

Senator SULLIVAN. And they are safe?

Mr. STITT. And they are safe. And we have some of the cleanest water, and I read those stats off earlier. It is the safest way to transport oil and natural gas.

Senator SULLIVAN. Why do you think there is this reflexive approach to stopping pipelines? The Keystone Pipeline that the Obama administration delayed for 8 years killed countless, thousands, tens of thousands of jobs. It just makes no sense.

Mr. STITT. I think Oklahomans, or I think Americans need to understand what happened with the Russian tanker that was sitting in the Boston Harbor, trying to bring liquefied natural gas from Russia, exporting our tax dollars and our jobs over there. I think Americans need to understand what is happening.

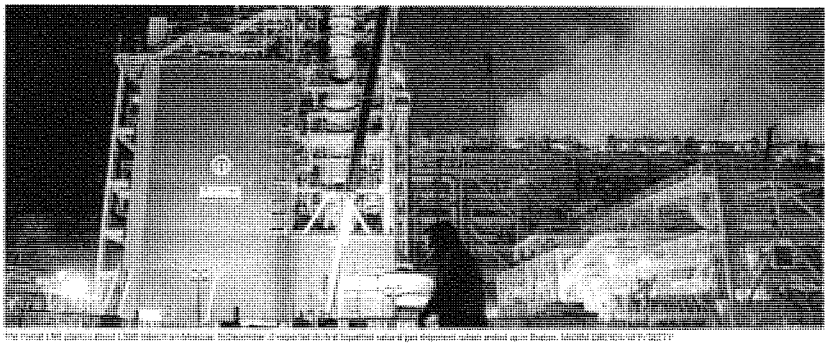
Senator SULLIVAN. By the way, the Boston Globe did I think a 3,000 page editorial, Mr. Chairman, I would like to get it for the record here, which really went into this in a damning way for the Massachusetts legislature and how irrational the policy was.

Senator BARRASSO. Without objection.

[The referenced information follows:]

Our Russian 'pipeline,' and its ugly toll

By the Editorial Board, February 12, 2018, 11:31 p.m.



To build the new $27 billion gas export plant on the Arctic Ocean that now keeps the lights on in Massachusetts, Russian firms bored wells into fragile permafrost; blasted a new international airport into a pristine landscape of reindeer, polar bears, and walrus; dredged the spawning grounds of the endangered Siberian sturgeon in the Gulf of Ob to accommodate large ships; and commissioned a fleet of 1,000-foot icebreaking tankers likely to kill seals and disrupt whale habitat as they shuttle cargoes of super-cooled gas bound for Asia, Europe, and Everett.

On the plus side, though, they didn't offend Pittsfield or Winthrop, Danvers or Groton, with even an inch of pipeline.

This winter's unprecedented imports of Russian liquefied natural gas have already come under fire from Greater Boston's Ukrainian-American community, because the majority shareholder of the firm that extracted the fuel has been sanctioned by the US government for its links to the war in eastern Ukraine and Russia's illegal annexation of Crimea. Last week, in response to the outcry, a group of Massachusetts lawmakers, led by Senator Ed Markey, blasted the shipments and called on the federal government to stop them.

But apart from its geopolitical impact, Massachusetts' reliance on imported gas from one of the world's most threatened places is also a severe indictment of the state's inward-looking environmental and climate policies. Public officials, including Attorney General Maura Healey and leading state senators, have leaned heavily on righteous-sounding stands against local fossil fuel projects, with scant consideration of the global impacts of their actions and a tacit expectation that some other country will build the infrastructure that we're too good for.

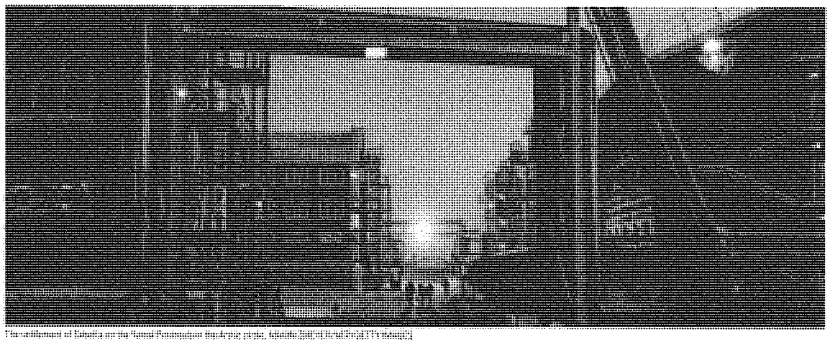
As a result, to a greater extent than anywhere else in the United States, the Commonwealth now expects people in places like Russia, Trinidad and Tobago, and Yemen to shoulder the environmental burdens of providing natural gas that state policy makers have showily rejected here. The old environmentalist slogan — think globally and act locally — has been turned inside out in Massachusetts.

But more than just traditional NIMBYism is at work in the state's resistance to natural gas infrastructure. There's also the $1 million the parent company of the Everett terminal spent lobbying Beacon Hill from 2013 to 2017, amid a push to keep out the domestic competition that's ended LNG imports in most of the rest of the United States.

And there's a trendy, but scientifically unfounded, national fixation on pipelines that state policy makers have chosen to accommodate. Climate advocates, understandably frustrated by slow progress at the federal level, have put short-term tactical victories against fossil

fuel infrastructure ahead of strategic progress on reducing greenhouse gas emissions, and so has Beacon Hill. They've obsessed over stopping domestic pipelines, no matter where those pipes go, what they carry, what fuels they displace, and how the ripple effects of those decisions may raise overall global greenhouse gas emissions.

The environmental movement needs a reset, and so does Massachusetts policy. The real-world result of pipeline absolutism in Massachusetts this winter has been to steer energy customers to dirtier fuels like coal and oil, increasing greenhouse gas emissions. And the state is now in the indefensible position of blocking infrastructure here, while its public policies create demand for overseas fossil fuel infrastructure like the Yamal LNG plant — a project likely to inflict far greater near and long-term harm to the planet.



The settlement of Sabetta on the Yamal Peninsula in the Arctic circle, despite cold, is booming.

Opening a gas export facility in such a harsh environment required overcoming both political obstacles — the US sanctions delayed financing — and staggering triumphs of industrial engineering by a workforce that reportedly reached 15,000 people. Dredgers scooped away 1.4 billion cubic feet of seabed to make room for the ships and built a giant LNG facility on supports driven into the permafrost, all in temperatures that can plunge to less than minus 50 degrees Fahrenheit.

The oil and gas industry poses serious threats, especially in an area like the Arctic that recovers slowly from damage, and in 2016 the Russian branch of the World Wildlife Fund issued a report warning of Yamal LNG's potential dangers. White toothed whales, a near-threatened species, breed in the vicinity of the facility, and the noise from shipping and the presence of more giant vessels "may force toothed whales to leave this habitat, which is crucial for their living, feeding, and reproduction."

The giant "Yamalmax" icebreaking tankers, longer than three football fields and designed to mow through ice up to six feet deep, are also "extremely bad news for any ice-associated mammals that should be in the vicinity of their path," said Sue Wilson, who leads an international research group based at the University of Leeds in the United Kingdom. The group has recently published a paper in the journal Biological Conservation on the impact of icebreakers on seal mothers and pups in the Caspian Sea and is currently studying shipping impacts in the Arctic.

"The captain is unlikely to notice — or even be able to see — seals in the vessel's path ahead," she said. "Even if the captain does notice, the fact that the ship is designed to proceed at a steady pace means that it is unlikely to attempt to stop for seals or maneuver around them, even if the ship can be slowed or stopped in time."

Advocates also worry that increased Arctic production and shipping will hurt indigenous people; sever reindeer migration routes ; import invasive species to an environment ill-equipped to deal with them; and introduce the very remote, but potentially cataclysmic, danger of an LNG explosion.

Finally, the gas pumped there will contribute to global climate change. In some parts of the world, especially China, LNG may provide climate benefits by displacing dirtier coal. If LNG displaces gas carried by pipeline, however, the math works out differently: Liquefied natural gas generally creates more emissions, since the process of cooling it to minus 260 degrees Fahrenheit and then shipping and regasifying it requires more energy than pumping natural gas through all but the longest and leakiest pipelines.

"The bottom line is that because of the nature of the liquefaction process, LNG is fairly carbon intensive," said Gavin Law, the head of gas, LNG, and carbon consulting for the energy consulting firm Wood Mackenzie. The exact difference depends on factors like how much pipelines leak, carbon impurities in the gas, age of equipment, and distance shipped, but generally LNG produces 5 to 10 percent more emissions over its whole life cycle from start to finish, he said.

From a planetary perspective, it doesn't matter where those emissions occur: Whether from the plant in Yamal, or the power plant in Everett, they have the same impact. The science should make the state's decisions straightforward.

"Natural gas has shown itself to be an important bridge to a clean energy future," said Ernest J. Moniz, the former secretary of energy in the Obama administration. "For New England, expanding the pipeline capacity from the Marcellus" — the area of shale gas production in Pennsylvania — "makes the most sense."

"Life cycle emissions for LNG imports to Boston certainly are higher than they would be for more Marcellus gas," he said.

But the upstream emissions typically don't show up on the books of states like Massachusetts, which judge the success of their climate efforts based only on how much greenhouse gas they emit within their own borders.

That's an accounting fiction. But it's a convenient one for lawmakers who've bowed to pressure to legislate based on what's visible inside the Commonwealth's own borders.

That's what state senators Marc Pacheco and Jamie Eldridge, the heads of the state Senate's Committee on Global Warming and Climate Change, heard when they conducted a listening tour of the state — whose results they released on the same day the Russian gas was unloading in Everett — to help prepare a new energy bill.

The resulting legislation was introduced this Monday. It contained many fine ideas, including boosting the state's renewable energy requirements. But it also would raise obstacles to pipelines that would lock in the state's reliance on foreign gas, with its higher carbon footprint.

In an interview, Pacheco said "Obviously any fossil fuel investments are problematic," no matter where they occur, but that "we have no control over what happens in Russia or anywhere else in the world." Eldridge said, "I think this bill takes a big step to preventing pipelines," and also expressed concern about the LNG the state imports instead. "I think activists need to think about where a large amount of this gas is coming from, and that could be something the Legislature could take a look at" in the future, he said.

Theirs isn't the first analysis to miss the larger picture.

In 2015, the Conservation Law Foundation, a prominent environmental advocacy group in Boston, released a report dismissing the need for new pipeline capacity in New England, and called on the region to rely on a "winter-only LNG 'pipeline,' " including imported gas, to meet its winter energy needs instead.

After the first shipload of Russian gas arrived, David Ismay, a lawyer with the group, stood by the recommendation and shrugged off the purchase of Russian gas from the Arctic as simply the nature of buying on the worldwide market. "I think it's important to understand that LNG is a globally traded commodity," he said in an interview with the Globe.

The foundation, he said, hadn't compared the overall greenhouse gas emissions from LNG to pipeline gas from the Marcellus to determine which was worse for the climate, nor had it factored the impact on the Arctic of gas production into its policy recommendations.

But a state policy that doesn't ask any questions about its fuel until the day the tanker floats into the Harbor abdicates the state's responsibility to own up to all consequences of its energy use — and mitigate the ones that it can.

WHEN AN ICEBREAKER BEARS DOWN on a mother seal during the springtime breeding season, the terrified animal tries to scurry away with her pup. The two may leave a trail of urine and feces on the ice, telltale signs of their distress. Even if the animals survive the collision, the disruption may separate the mother and pup, leading to the pup's death.

Conscientious companies can minimize the cruel realities of global shipping — or conscientious governments can force them to. American law, for instance, requires ships to maintain a safe distance from seals and walruses in ice habitats. Wilson, the seal researcher, also suggested that icebreakers can change routes to avoid known seal habitats, especially during the breeding season, and carry trained observers onboard to advise vessel captains and record any adverse impact, particularly on mothers and young.

The Globe attempted to contact Sovcomflot, the Russian state-owned shipper in St. Petersburg that handled the first leg of the first shipment from Siberia to Everett, about what policies, if any, it employs to avoid killing seals and other wildlife, and whether it would halt LNG shipments during the spring as mother seals nurse their pups in the Arctic.

As of Monday night, it had not responded to e-mails.

The policy of Massachusetts, apparently, is to hope that the Russians are on top of it — and that the world beyond the state's borders manages the impacts of fossil fuel production and transportation that the Commonwealth buys and uses, but considers itself too pure to handle itself.

As of Monday night, the next shipment of Russian gas was anchored about 70 miles off Gloucester.

Show 82 comments

Senator SULLIVAN. Governor, continue.

Mr. STITT. I will read real quick our water quality and some of our air quality facts in Oklahoma, because if pipelines were the problem, these facts would not be accurate. We are No. 1 in the Nation in phosphorus load reduction in 2018 in our water bodies. We are No. 3 in the Nation in nitrogen load reduction in 2018. We are No. 1 in the Nation for non-point source success stories with more water bodies delisted from the impaired list of any other State.

Because of our natural gas generation, we are double the national average in our reduction of emissions. Double the national average. So, sulfur dioxide is down 56 percent since 2011, nitrogen oxide is down by 69 percent since 2011, carbon dioxide is down 37 percent since 2011.

So really, the issue is we are weaponizing, we are talking about, States are not talking about water quality, they are talking about their hatred for fossil energy, and that is really the issue. We need to bring time and scope around this issue, so assets of some States are not infringed upon by others.

Senator SULLIVAN. Governor, do you want to comment real quick?

I know we are running out of time, and I apologize, Mr. Chairman.

Mr. GORDON. No, thank you, Mr. Chairman, Senator. No, I absolutely agree with my colleague from Oklahoma. This Act really centers it back on water quality. That is the issue that is at play here.

Your question really went to classes of actions. The example that I gave before was really about if Wyoming were so inclined to, say, look, our wildlife is very important, it is going to affect our migration corridors, you are going to affect our calving populations on various animals. We believe that wind farms are an impediment to that, and the stormwater quality permit that we are going to give is now therefore in peril because of wildlife associated impacts. That has nothing to do with water, but it is tantamount to using it to say, we don't want wind development for our wildlife.

What I think this Act does is to recenter the conversation, really, on water quality and the opportunity for States to operate within those parameters in their own boundaries.

Senator SULLIVAN. Thank you.

Senator BARRASSO. Thank you.

Before turning to Senator Carper, I would like to also introduce for the record an editorial similar to the one that you talked about, about the Boston Harbor. This was in yesterday's Wall Street Journal, and it is called Cuomo's Carbon Casualties, where they say the pipeline he vetoed, Governor Cuomo vetoed, below New York Harbor, could reduce annual CO_2 emissions by the equivalent of 500,000 cars on the road. His gas embargo is raising State emissions.

Without objection I will introduce this into the record.

[The referenced information follows:]

Cuomo's Carbon Casualties

New York Gov. Andrew Cuomo is a proud opponent of fossil fuels. But now that the consequences of his policies are harming people in the real world—those who can't afford to escape to Florida—the Governor is blaming others.

Mr. Cuomo has blocked shale fracking upstate and several pipelines delivering natural gas from Pennsylvania in the name of protecting waterways. But this is an excuse. Natural-gas production in Pennsylvania has increased 60% since Mr. Cuomo banned fracking five years ago, adding $6 billion to Keystone State GDP and its waterways are fine.

Ban pipelines and fracking and then blame business for shortages.

Mr. Cuomo's real purpose is to eliminate natural gas as part of his political commitment to "carbon neutrality" by 2050, and this isn't a cost-free promise. Upstate New Yorkers struggle economically and pay among the highest energy costs in the U.S. A quarter still rely on heating oil, which costs about $1,000 a year more than natural gas and emits nearly 40% more CO2. New Yorkers pay about 40% more for electricity than Pennsylvanians and 16% more than in New Jersey.

The utility Con Edison in March halted natural gas hookups north of New York City due to pipeline constraints. National Grid, the gas utility that serves Long Island, this fall imposed a moratorium on new hookups after the Governor vetoed a 23-mile gas pipeline beneath New York Harbor. National Grid said it couldn't guarantee uninterrupted service without the pipeline. New oil-to-gas conversions could cause future gas shortages and outages.

The Governor's response: Who cares? "The 'moratorium' is either a fabricated device or a lack of competence," the Governor wrote to National Grid last week. Mr. Cuomo ordered the utility to explore "short-term options" to increase supply such as transporting natural gas by tanker or truck. "Other infrastructure could be proposed or additional unloading facilities installed," he said.

Building barges would require environmental permitting and is opposed by green groups in any case. National Grid already plans to deliver compressed natural gas by truck during the winter, but what if a snow storm closes roads? Perhaps "heat pumps and renewable sources" could alleviate the gas shortage, Mr. Cuomo says.

The Governor claims the utility violated its "fundamental legal obligation" by inadequately managing supply and demand. He also blames the utility for promoting oil-to-gas conversions even though this advances the state's climate goals. One irony is that the pipeline he vetoed below New York Harbor could reduce annual CO2 emissions by the equivalent of 500,000 cars on the road. His gas embargo is raising state emissions.

Regardless, if National Grid doesn't repair his pipeline blunder by Thanksgiving, the Governor says he'll yank its public franchise. "This would be one of the most lucrative franchises in the country," Mr. Cuomo declared last week. At least until the unlucky winner becomes the next scapegoat for the Governor's destructive energy policies.

Senator BARRASSO. Senator Carper.

Senator CARPER. I want to again, welcome, it was very nice meeting each of you. One of you, I have met previously, the Governor of Wyoming.

But to Ms. Watson, Governor Gordon, and Governor Stitt, thank you all for joining us today.

When I was privileged to be Governor of Delaware for 8 years, I used to love to testify before Congress. Delaware was close by; it is an easy train ride. So I was an easy mark. The Governors Association, nobody wanted to come in from Wyoming or some other place, they would say, well, send Carper. I was always happy to go. I hope it is a good experience for you, and we welcome you.

I think and speak a lot as a recovering Governor. I appreciate the opportunity here, especially from the three of you, and then from States regarding how they feel about proposals to alter State authorities under Section 401 of the Clean Water Act.

I just want to thank our Governors for taking the time out of your schedules to share your views with us on what is an important topic, obviously, to your States, and I think to ours as well.

I have a longer statement that I want to submit for the record. But I would like to take a minute, if I could, to reflect on the relationship between the Federal and State governments when it comes to clean water. To be honest with you, if I were a sitting Governor, instead of a recovering Governor, I would be uneasy about the prospects of changing that Federal-State relationship.

On the one hand, the current Administration, my colleagues, on the other hand, on the other side of the dais, have great confidence in States' abilities to protect waters in their States, and want them to do more of it by making them responsible for managing additional bodies of water, as the proposed changes to the definitions of waters of the U.S. on the Clean Water Act would require them to do.

However, when it comes to managing and maintaining the quality of water, some suggest that the rights reserved to States to protect water under the Clean Water Act should be changed. I think this distorted interpretation of cooperative federalism is not just ironic, it is actually pretty unpopular with the majority of States.

I wonder if we are going to be able to reconcile that fundamentally contradicting approach to States' rights. We will see. But I am hopeful that today's hearing can shed some light on that subject.

Next, I would just like to read, if I could, claims I think made by our friends on the other side of the aisle, and I am tempted to call them false claims, but I'll just say questionable claims, and I will pull my punch. But the State of Washington's action is about politics—this is a claim—that the State of Washington's actions about politics has nothing to do with clean water. The State of Washington's own environmental impact study for the project found that there would be no significant impacts to water quality. That is the claim.

And here is a rebuttal. In its 401 submission, the Millennium Bulk Project failed to show that it would adequately mitigate for its water quality impacts. The environmental impact study did not conclude that there would be no impacts to water quality. Rather, the environmental impact study concluded that if the company

demonstrated that it could meet all water quality requirements, then there would be no significant impact to water. But the company failed to make that demonstration.

Mr. Chairman, I would ask unanimous consent to submit for the record the actual 401 determination which makes absolutely no reference to climate change and other impacts, just water quality effects. I make that unanimous consent request.

Senator BARRASSO. Without objection.

[The referenced information was not received at time of print.]

Senator CARPER. Thank you.

Here is another claim that I would characterize as misleading. "And the State of Washington has abused its authority to block the export of coal mined in Wyoming, Utah, Colorado, and Montana."

The rebuttal to that from the State of Washington is the following: "The State of Washington denied the water quality certification to the coal export terminal because it failed to demonstrate reasonable assurance that water quality requirements would be met."

The project's proponent has appealed Washington's decision. Every tribunal that has reviewed it has upheld Washington's decision.

Mr. Chairman, I would ask unanimous consent to offer for the record a letter sent to you and to Ranking Member, me, Carper, on August 15th, 2018, from Maia Bellon, Director at Washington Department of Ecology, which states, "The facts of this denial of the Millennium Coal Export Terminal are simple. Millennium failed to meet existing water quality standards, and further failed to provide any mitigation plan for the areas the project would devastate, especially along the Columbia River. To approve this permit under the circumstances would not only have been irresponsible, it would have posed serious health risks to impacted communities and the surrounding environment."

Senator BARRASSO. Without objection.

[The referenced information follows:]

STATE OF WASHINGTON
DEPARTMENT OF ECOLOGY
PO Box 47600 • Olympia, WA 98504-7600 • 360-407-6000
711 for Washington Relay Service • Persons with a speech disability can call 877-833-6341

August 15, 2018

The Honorable John Barrasso
Chairman, Senate Environment & Public Works Committee
307 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Tom Carper
Ranking Member, Senate Environment & Public Works Committee
513 Hart Senate Office Building
Washington, DC 20510

Dear Chairman Barrasso and Ranking Member Carper:

The Washington State Department of Ecology has been falsely accused of denying a water quality permit to the Millennium project based on our agency's so-called philosophical opposition to the coal export terminal. This is frankly nonsense.

The facts of this denial are simple: Millennium failed to meet existing water quality standards and further failed to provide any mitigation plan for the areas the project would devastate—especially along the Columbia River. To approve this permit under the circumstances would not only have been irresponsible, it would have posed a serious health risk to impacted communities and the surrounding environment.

As you know, the Clean Water Act charges states with the authority and responsibility to protect water quality within their borders by issuing permits and licenses. In this case, as in all previous cases, the Department of Ecology acted within its legal responsibility and did its duty to apply the regulations and follow legal precedent in an evenhanded manner.

In the company's filings in its many legal challenges to the Department of Ecology's decision, Millennium has acknowledged the basis of the permit denial: At many stages, the applicant failed to provide reasonable assurance that the project would not cause irreparable harm to water quality. The company acknowledges these shortcomings, but claims for itself the right to ignore them. They simply resist playing by the same rules required of everyone else.

All you have to do is look at a list of the impacts from this project to understand its potential to damage Washington's water quality:

- Destroying 24 acres of wetlands and 26 acres of forested habitat.
- Dredging 41 acres of river bed.
- Driving 537 pilings into the river bed for over 2,000 feet of new docks, resulting in the loss of five acres of aquatic habitat.
- Increasing vessel traffic on the Columbia River by 25 percent – an additional 1,680 ship trips a year.

The sheer scale of the proposal poses obvious environmental challenges, regardless of the material being handled:

- 1.5 million tons of material stockpiled on site – picture an 85-foot-high pile of coal running the length of the National Mall, from the steps of the Capitol to the foot of the Lincoln Memorial.
- Contaminated stormwater running off those piles (in addition to the coal dust and spillage tied to moving material from rail to ship).
- Sixteen train trips a day, each over a mile long and pulled by four diesel locomotives.

In short, there are multiple, insolvable problems with the proposal. The company understood these problems when the Department of Ecology completed the environmental impact statement in partnership with Cowlitz County. Although the company did not challenge the findings of the environmental study, its leaders appear to believe that if they can only yell loudly enough, these environmental impacts will somehow disappear.

Though the Department of Ecology has been accused of being biased for its denial of this permit, it is not the first entity to reject a coal terminal in the Northwest. Two others have been proposed and rejected in recent years: One by the U.S. Army Corps of Engineers and one by the State of Oregon. Each of those proposed projects raised similar issues to this one.

We are confident in the work we have done to protect Washington waters from irreparable harm. The Columbia River is the beating heart of Washington State. It is our nation's fourth-largest river and home to endangered salmon. The health of this river is vital to our state's agricultural and manufacturing economies, central to our energy production, relied on by Washington's treaty tribes, and an irreplaceable link in the environment that Washingtonians treasure.

The Columbia River deserves the full protection of the law, and the Department of Ecology honored both the letter and the intent of the law in making our decision. The idea that the federal government can run roughshod over the decisions of those who know, live in, and love Washington is deeply troubling.

For more than a year, my agency has been falsely charged with every manner of malfeasance by the proponents of this project. Officials in states that would bristle at the hint of federal

oversight over their own decision-making have nevertheless felt empowered to second-guess every comma and semicolon in our filings. Again and again, they have grossly mischaracterized our decisions, impugned our motives and challenged longstanding legal precedents.

Many legal bodies have already examined our authority and our decision. All of them have affirmed our actions. The water quality certification itself is just one of 23 approvals needed from local, state and federal authorities. Department of Ecology is one of three independent government bodies that has rejected this proposal.

The company's appeal of the Department of Ecology's decision now appropriately rests with Washington State's Pollution Control Hearings Board, which has indicated that it will issue a summary judgment decision in the days ahead. We anticipate the pollution board's decision will validate ours.

A copy of the state's denial is enclosed for your reference. I hope this letter helps committee members understand the facts about the permit denial. I am proud of the effort that my agency dedicated to this project. And I will continue to defend our water quality decision every step of the way.

Thank you for your interest in this matter.

Sincerely,

Maia D. Bellon
Director

cc: Patty Murray, Senator
Maria Cantwell, Senator
Senate Environment & Public Works Committee Members

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September 26, 2017

Millennium Bulk Terminals-Longview, LLC
ATTN: Ms. Kristin Gaines
4029 Industrial Way
Longview, WA 98632

RE: Section 401 Water Quality Certification Denial (Order No. 15417) for Corps Public Notice No. **2010-1225** Millennium Bulk Terminals-Longview, LLC Coal Export Terminal – Columbia River at River Mile 63, near Longview, Cowlitz County, Washington

Dear Ms. Gaines:

The Washington State Department of Ecology (Ecology) has reached a decision on the Millennium Bulk Terminals-Longview request for a Section 401 Water Quality Certification for the proposed coal export terminal near Longview. After careful evaluation of the application and the final State Environmental Policy Act environmental impact statement, Ecology is denying the Section 401 Water Quality Certification with prejudice.

The attached Order describes the specific considerations and determinations made by Ecology in support of this decision to deny the Certification with prejudice. Your right to appeal this decision is described in the enclosed denial Order.

Sincerely,

Maia D. Bellon
Director

Enclosure

By certified mail [91 7199 9991 7034 8935 6995]

cc: Muffy Walker, U.S. Army Corps of Engineers
Danette Guy, U.S. Army Corps of Engineers
Glenn Grette, Grette Associates, LLC

IN THE MATTER OF DENYING SECTION 401 WATER QUALITY CERTIFICATION TO Millennium Bulk Terminals-Longview, LLC in accordance with 33 U.S.C. §1341 (FWPCA § 401), RCW 90.48.260, RCW 43.21C.060, WAC 197-11-660, WAC 173-802-110, and Chapter 173-201A WAC	))))))))	**ORDER # 15417** **Corps Reference #NWS-2010-1225** Millennium Bulk Terminals-Longview, LLC Coal Export Terminal – Columbia River at River Mile 63, near Longview, Cowlitz County, Washington

TO: Millennium Bulk Terminals-Longview, LLC
Attention: Ms. Kristin Gaines
4029 Industrial Way
Longview, Washington 98632

On February 23, 2012, Millennium Bulk Terminals-Longview, LLC (Millennium) submitted a Joint Aquatic Resources Permit Application (JARPA) to the Department of Ecology (Ecology) requesting a Section 401 Water Quality Certification to construct a coal export terminal in Longview, Washington. Then on January 28, 2013, Millennium sent a letter to the U.S. Army Corps of Engineers (Corps) and Ecology in which Millennium withdrew the request for the Section 401 Certification. Millennium stated that it would submit a new request when the Environmental Impact Statement (EIS) process concluded. In addition, on February 6, 2013, Millennium submitted an Ecology Water Quality Certification Processing Request form stating that it wished to withdraw its request and would resubmit near the end of the EIS process.

On July 18, 2016, Millennium submitted a new JARPA and request for Section 401 Water Quality Certification. A notice regarding this request was distributed as part of a Corps joint public notice on September 30, 2016. On June 22, 2017, Ecology received a withdrawal/reapply form from Millennium, which triggered another public notice that was issued on June 27, 2017.

Millennium proposes to construct and operate a coal export terminal (Project) in and adjacent to the Columbia River (at approximately river mile 63) that would transfer up to a nominal 44 million metric tons per year (MMTPY) of coal from trains to ocean-going vessels. The completed coal export terminal would cover approximately 190 acres of the approximately 540-acre property. The Project would consist of two docks, ship loading systems, stockpiles and equipment, rail car unloading facilities, an operating rail track, rail storage tracks to park up to eight trains, associated facilities, conveyors, and necessary dredging. The Project would be constructed in two stages over several years.

- Stage 1 of the Project would consist of facilities to unload coal from trains, stockpile the coal on site, and load coal into ocean-going vessels at one of the two new docks. During Stage 1, Millennium would construct two docks (Dock 2 and 3), one ship loader and related conveyors on Dock 2, berthing facilities on Dock 3, a stockpile area including two stockpile pads, railcar unloading facilities, one operating rail track, up to eight rail storage tracks for train parking, Project site

ground improvements, and associated facilities and infrastructure. Once Stage 1 is completed, the Project would be capable of a throughput capacity of a nominal 25 MMTPY.

- During Stage 2, MBTL would construct an additional ship loader on Dock 3, two additional stockpile pads, conveyors, and equipment necessary to increase throughput by approximately 19 MMTPY, to a total nominal throughput of 44 MMTPY.

The main elements of Stage 1 development would include:

- Rail bed.
- Rail loop with arrival and departure tracks to include one operating track (turn around track) and eight rail storage tracks.
- One tandem rotary unloader (capable of unloading two rail cars) for operations, and one tandem rapid discharge unloader to be used during startup and maintenance.
- Two coal stockpile pads, Pads A and B.
- Two rail-mounted luffing/slewing stackers and associated facilities for Pads A and B.
- Two rail-mounted bucket-wheel reclaimers and associated facilities for Pads A and B.
- Two shipping docks (Dock 2 and Dock 3), with one ship loader and associated facilities on Dock 2.
- Conveyors, transfer stations, and surge bin from the stockpile pads to the ship loading facilities.
- In-bound and out-bound coal sampling stations.
- Support structures, electrical transformers, switchgear and equipment buildings, and process control systems.
- Upland facilities, including roadways, service buildings, water management facilities, utility infrastructure, and other ancillary facilities.

The main elements of Stage 2 development would include:

- Associated conveyors and transfer stations to the stockpile Pads C and D from the rail receiving station.
- Two additional coal stockpile pads, Pads C and D.
- Two additional rail-mounted luffing/slewing stackers and associated facilities.
- Two additional rail-mounted bucket-wheel reclaimers and associated facilities.
- One additional ship loader and associated facilities on Dock 3.
- Conveyors, transfer stations, and surge bins from stockpile Pads C and D to the ship loading facilities.

The Project proposes impacting over 32 acres of wetlands (24 acres of which will be new impacts) and almost 6 acres of ditches. To offset these impacts Millennium has proposed to

construct a wetland mitigation site that encompasses approximately 100 acres. The Project will also have 4.83 acres of new overwater coverage, and includes constructing an off-channel slough mitigation site to address those impacts.

I. AUTHORITIES

In exercising its authority under 33 U.S.C. § 1341, RCW 43.21C.060, and RCW 90.48.260, Ecology has examined this application pursuant to the following:

1. Conformance with applicable water quality-based, technology-based, and toxic or pre-treatment effluent limitations as provided under 33 U.S.C. §§ 1311, 1312, 1313, 1316, and 1317 (FWPCA §§ 301, 302, 303, 306, and 307).

2. Conformance with the state water quality standards contained in Chapter 173-201A WAC and authorized by 33 U.S.C. § 1313 and by Chapter 90.48 RCW, and with other applicable state laws.

3. Conformance with the provision of using all known, available, and reasonable methods to prevent and control pollution of state waters as required by RCW 90.48.010.

4. Conformance with applicable State Environmental Policy Act (SEPA) policies under RCW 43.21C.060 and WAC 173-802-110.

Pursuant to the foregoing authorities and in accordance with 33 U.S.C. § 1341, RCW 90.48.260, RCW 43.21C.060, Chapter 173-200 WAC, Chapter 173-201A WAC, WAC 197-11-660, WAC 173-802-110, and Chapter 173-201A WAC, as more fully explained below, Ecology is denying the Millennium Bulk Terminals-Longview request for Section 401 Water Quality Certification with prejudice.

II. STATE ENVIRONMENTAL POLICY ACT (SEPA)

The Final Environmental Impact Statement (FEIS) issued by Cowlitz County and Ecology on April 28, 2017, identified nine areas of unavoidable and significant adverse impacts that would result from the construction and operations of the Project. As analyzed in the FEIS, the detrimental environmental consequences related to these impacts cannot be reasonably mitigated. Further, the adverse impacts to the built and natural environments conflict with Ecology's SEPA policies found in WAC 173-802-110. These policies state:

> (1)(a) The overriding policy of the department of ecology is to avoid or mitigate adverse environmental impacts which may result from the department's decisions.
>
> (b) The department of ecology shall use all practicable means, consistent with other essential considerations of state policy, to improve and coordinate plans, functions, programs, and resources to the end that the state and its citizens may:

(i) Fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;

(ii) Assure for all people of Washington safe, healthful, productive, and aesthetically and culturally pleasing surroundings;

(iii) Attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;

(iv) Preserve important historic, cultural, and natural aspects of our national heritage;

(v) Maintain, wherever possible, an environment which supports diversity and variety of individual choice;

(vi) Achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and

(vii) Enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

(c) The department recognizes that each person has a fundamental and inalienable right to a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.

(d) The department shall ensure that presently unquantified environmental amenities and values will be given appropriate consideration in decision making along with economic and technical considerations.

A. Significant Unavoidable Adverse Impacts

1. **Air Quality.** The FEIS found a significant increase in cancer risk for areas along rail lines and around the Project site in Cowlitz County where diesel emissions primarily from trains would increase. The study found that residents in some areas in Cowlitz County, including those living in portions of the Highlands neighborhood, would experience an increase in cancer risk rate up to 30 cancers per million. These levels of increased risk exceed the approvability criteria in WAC 173-460-090 for new sources that emit toxic air pollutants. Although WAC 173-460 only applies to stationary sources, the health risks from mobile sources in this case, primarily locomotives, would be considered significant using the same approvability criteria. Thus, the FEIS concluded the emission of diesel particulate primarily from train locomotives would be a significant unavoidable adverse impact. As the FEIS explained, this impact could be mitigated, but not eliminated, by use of cleaner burning Tier 4 locomotives. However, use of such locomotives is outside the control of Millennium and may not

occur for decades because use of older locomotives is currently allowed under federal law. Other mitigation measures identified in the FEIS related to air quality, such as use of best management practices and compliance with permits, would not reduce diesel emissions from Project related locomotives.

The increased cancer risk associated with the Project is a significant adverse unmitigated impact that is inconsistent with the following substantive SEPA policies in WAC 173-82-110:

- Fulfill the responsibilities of each generation as trustee of the environment for succeeding generations.
- Assure for all people of Washington safe, healthful, productive, and aesthetically and culturally pleasing surroundings.
- Attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences.

2. **Vehicle Transportation.** The FEIS found that there would be significant unavoidable adverse impacts to vehicle traffic from the proposed action when the Project reaches full operation in 2028 due to vehicle delays caused by increased train traffic that would block rail crossings in Cowlitz County. With current track infrastructure on the Reynolds Lead and BNSF Railway (BNSF) spur, Project-related trains in 2028 would increase the total gate downtime by over 130 minutes during an average day at the six crossings listed below. Project-related trains would cause these crossings to operate at Level of Service E or F[1] if one Project-related train traveled during peak traffic hours through the following crossings:

- Project area access opposite 38th Avenue
- Weyerhaeuser access opposite Washington Way
- Industrial Way
- Oregon Way
- California Way
- 3rd Avenue

[1] "Level of Service" is a report card rating based on the delay experienced by vehicles at an intersection or railroad crossing. Level of Service A, B, and C indicate conditions where traffic moves without substantial delays. Level of Service D and E represent progressively worse operating conditions. Level of Service F represents conditions where average vehicle delay has become excessive and demand has exceeded capacity.

Millennium and BNSF may make track improvements to the Reynolds Lead and BNSF spur that would allow trains to travel faster through these intersections and thereby reduce gate downtimes. However, even with these planned track improvements to the Reynolds Lead and BNSF Spur, the Project at full build out in 2028 would still adversely impact and add delays at four crossings, and cause the following crossings to operate at Level of Service E or F if two proposed Project-related trains traveled through them during peak traffic hours:

- Project area access opposite 38th Ave
- Weyerhaeuser access opposite Washington Way
- 3rd Avenue
- Dike Road

On the BNSF main line in Cowlitz County, the increased Project-related trains at full build out in 2028 could adversely impact vehicle transportation at two crossings during peak traffic hours. The following crossings would operate Level of Service E if two Project-related trains travel during the peak hours:

- Mill Street
- South River Road

Delay of emergency vehicles at rail crossing would also increase because of additional Project-related trains.

As described in the FEIS, Millennium has agreed or may be required to implement several mitigation measures to address these impacts. These measures include funding crossing gates at the intersection of Industrial Way, holding safety review meetings, and notifying agencies about increases in operations on the Reynolds Lead. However, these measures will not reduce or eliminate the vehicle delays identified in the FEIS. Vehicle delays could be reduced by further improvements to rail and road infrastructure, however, it is currently unknown when or if such improvements would occur. Therefore, when the Millennium Project is at full operation in 2028, unavoidable and significant adverse impacts would occur on vehicle transportation at certain crossings in Cowlitz County including delays of emergency vehicles. This impact is inconsistent with the following substantive SEPA policies:

- Assure for all people of Washington safe, healthful, productive, and aesthetically and culturally pleasing surroundings.
- Attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences.
- Maintain, wherever possible, an environment which supports diversity and variety of individual choice.

- Achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities.

3. Noise and Vibration. The FEIS found that there would be significant unavoidable adverse impacts to residences near four public at-grade crossings along the Reynolds Lead and BNSF spur from train-related noise. Train-related noise levels would increase from train operations and locomotive horn sounding intended for public safety.

Residences near the at-grade crossings at 3rd Avenue, California Way, Oregon Way, and Industrial Way would experience increased daily noise levels that would exceed applicable noise criteria per Federal Transportation Administration/Federal Rail Administration guidance.

Approximately 229 residences would be exposed to moderate noise impacts, and approximately 60 residences would be exposed to severe noise impacts. Although these impacts would be reduced near the Industrial Way and Oregon Way crossings if a grade-separated intersection is constructed there as currently proposed, the proposal has not yet received permits and its completion date is unknown.

As described in the FEIS, Millennium has agreed or may be required to implement several mitigation measures to address these train-related noise impacts. These measures include funding two "quiet crossings" at Oregon Way and Industrial Way grade crossings by installing crossing gates, barricades, and additional electronics. This proposed "quiet crossing" is not the same as a Quiet Zone, which requires the approval of the Federal Railroad Administration. The reduction of noise pollution from the proposed "quiet crossing" is unknown because Millennium trains may still be required to sound their horns at the intersections. Other measures include requiring Millennium to work with the City of Longview, Cowlitz County, Longview Switching Company, the affected community, and other applicable parties to apply for and implement a Quiet Zone that would include the 3rd Avenue and California Avenue crossings. However, as a Quiet Zone requires the approval of the Federal Railroad Administration, it is beyond the control of Millennium and it is unknown if it will ever be implemented. Consequently, Quiet Zones are not considered an applicable mitigation measure.

The FEIS states that, if the Quiet Zone is not implemented, Millennium would fund a sound-reduction study to identify ways to mitigate the moderate and severe impacts from train noise. However, it is unknown who would fund, implement, and maintain recommendations to mitigate moderate and severe noise impacts identified in the sound noise reduction study. The study itself does not mitigate the impacts. The Project's significant adverse impacts from noise are inconsistent with the following substantive SEPA policies:

- Fulfill the responsibilities of each generation as trustee of the environment for succeeding generations.

- Assure for all people of Washington safe, healthful, productive, and aesthetically and culturally pleasing surroundings.
- Maintain, wherever possible, an environment which supports diversity and variety of individual choice.
- Attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences.

4. **Social and Community Resources.** The FEIS found that social and community resources would be significantly and adversely impacted by increased noise, vehicle delays, and air pollution. Impacts from the construction and operation of the Project would impact minority and low-income populations by causing disproportionately high and adverse effects. Impacts from noise, vehicle delay, and diesel particulate matter inhalation risk would affect the Highlands neighborhood, a minority and low-income neighborhood adjacent to the Reynolds Lead in Longview, Washington.

a. Adverse Health Impact from Increased Cancer Risk Rate: Project-related trains and other operations would increase diesel particulate pollution along the Reynolds Lead, BNSF Spur, and BNSF mainline in Cowlitz County at levels that would result in increased cancer risk rates. The modeled cancer risk rate in the FEIS found a majority of the Highlands neighborhood would experience an increased cancer risk rate, varying from 3% to 10%. Use of Tier 4 locomotives, which produce less diesel pollution, by BNSF would reduce but not eliminate diesel particulate matter emissions and the associated potential cancer risk in the Highlands neighborhood. However, requiring Tier 4 locomotives is outside the control of Millennium and may not occur for decades. Therefore, the Project's disproportionately high adverse effects related to increased cancer risk rates from diesel particulate matter inhalation on minority and low-income populations would be unavoidable.

b. Adverse Noise Impact: The Project would add 16 trains per day on the Reynolds Lead and increase average daily noise levels, which would exceed applicable criteria for noise impacts and cause moderate to severe impact to 289 residences in the Highlands neighborhood. Approval, funding, and construction of Quiet Zones for four highway and rail intersections would reduce noise levels. However, there is no sponsor(s) identified to apply for, fund, and maintain Quiet Zones that would reduce noise levels at the four rail crossings. Quiet Zones are outside the control of Millennium and require approval from the Federal Railroad Administration. Therefore, Project-related trains would cause significant adverse unavoidable impacts to portions of the Highlands neighborhood and cause a disproportionately high adverse effect on minority and low-income populations.

c. Adverse Vehicle Traffic Impact: Project-related trains would increase vehicle delays at highway and rail intersections within the Highlands

neighborhood. With the current track infrastructure on the Reynolds Lead, a Millennium-related train traveling during the peak traffic hours would result in a vehicle-delay impact at four public at-grade crossings in or near the Highlands neighborhood by 2028. This would constitute a disproportionately high adverse effect on minority and low-income populations. If planned improvements to the Reynolds Lead are made, the adverse impacts related to vehicle delay could be reduced but not eliminated. However, rail improvements have not received permits and their completion is unknown. Therefore, Millennium's disproportionately high adverse effects to vehicle traffic on minority and low-income populations would be unavoidable.

5. **Rail Transportation.** The FEIS found that the Project would cause significant adverse effects on rail transportation that cannot be mitigated. At full build out of the Project, 16 trains a day (8 loaded and 8 empty) would be added to existing rail traffic. Three segments on the BNSF main line routes in Washington (Idaho/Washington State Line–Spokane, Spokane–Pasco, and Pasco–Vancouver) are projected to exceed capacity with the current projected baseline rail traffic in 2028. Adding the 16 additional Millennium-related trains would contribute to these three segments exceeding capacity by 2028, based on the analysis in the FEIS and assuming existing infrastructure. As described in the FEIS, Millennium would mitigate some of the impacts by notifying BNSF and Union Pacific (UP) about upcoming increases in operations at the Millennium site. This proposed mitigation measure is informational and does not commit BNSF or UP to take action to increase capacity.

BNSF and UP could make necessary investments or operating changes to accommodate the rail traffic growth, but it is unknown when these actions would be taken or permitted. Improving rail infrastructure is outside the control of Millennium and cannot be guaranteed. Under current conditions Millennium-related trains would contribute to these capacity exceedances at three rail segments on the main line and could result in an unavoidable and significant adverse impact on rail transportation, including delays and congestion.

This impact is inconsistent with the following substantive SEPA policies:

- Fulfill the responsibilities of each generation as trustee of the environment for succeeding generations.
- Assure for all people of Washington safe, healthful, productive, and aesthetically and culturally pleasing surroundings.
- Attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences.

6. **Rail Safety.** The FEIS found that Millennium-related trains would increase the train accident rate by 22 percent along the rail routes in Cowlitz County and Washington. As described in the FEIS, Millennium would notify BNSF and UP about upcoming increases in operations at the Millennium site. However, this notification measure does not commit BNSF or UP to take action or make changes that would reduce accident rates.

To reduce some of the impacts to rail safety, the Longview Switching Yard, BNSF, and UP could improve rail safety through investments or operational changes, but it is unknown when or whether those actions would be taken or permitted. Improving rail infrastructure to increase rail safety is outside the control of Millennium and cannot be guaranteed. Therefore, the 22 percent increase to the rail accident rate over baseline conditions attributable to Millennium would result in unavoidable and significant adverse impacts on rail safety.

This impact is inconsistent with the following substantive SEPA policies:

- Fulfill the responsibilities of each generation as trustee of the environment for succeeding generations.
- Assure for all people of Washington safe, healthful, productive, and aesthetically and culturally pleasing surroundings.
- Attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences.

7. **Vessel Transportation.** The FEIS found that the Project would have significant adverse effects on vessel transportation that cannot be mitigated. Millennium would add 1,680 ship transits to the current 4,440 ship transits on the Columbia River per year, for a total of 6,120 at full build out. Thus, the Project would be responsible for over one quarter of the traffic in the Columbia River.

Based on marine accident transportation modeling, the FEIS found the increased vessel traffic would increase the frequency of incidents such as collisions, groundings, and fires by approximately 2.8 incidents per year. While the chance that an incident would result in serious damage or spill is low, if a spill were to happen, the impacts to the environment and people would be significant and unavoidable.

An increase in vessels calling at the proposed new docks increases the risk of vessel-related emergencies, such as fire or vessel allision. An increase in vessels calling at the new docks also increases risk of spills from refueling ships at berth, although Millennium has stated there would be no refueling at the new docks. The FEIS proposes a mitigation measure that if refueling at the docks were to start, the company would notify Cowlitz County and Ecology. Another mitigation measure in the FEIS involves Millennium's attending at least one Lower Columbia Harbor Safety Committee meeting per year.

Although these proposed mitigation measures would support communication and awareness, they would not reduce environmental harm or the impact of an incident.

If a Millennium-related vessel incident such as a collision or allision were to occur, impacts could be adverse and significant, depending on the nature and location of the incident, the weather conditions at the time, and whether any oil were discharged. Although the likelihood of a serious Millennium-related vessel incident is low, the consequences would be severe and there are no mitigation measures that can completely eliminate the possibility of an incident or the resulting impacts. *See* WAC 197-11-794(2) (an impact may be significant if its chance of occurrence is not great but the resulting environmental impact would be severe if it occurred).

This adverse impact is inconsistent with the following Ecology SEPA policies:

- Fulfill the responsibilities of each generation as trustee of the environment for succeeding generations.
- Assure for all people of Washington safe, healthful, productive, and aesthetically and culturally pleasing surroundings.
- Attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences.

8. Cultural Resources. The FEIS found that construction of the coal export terminal would demolish the Reynolds Metals Reduction Plant Historic District, which would be an unavoidable and significant adverse environmental impact. Construction of the Project would demolish 30 of the 39 identified resources that contribute to the historical significance of the Historic District. The anticipated adverse impacts on these resources would diminish the integrity of design, setting, materials, workmanship, feeling, and association that make the Historic District eligible for listing in the National Register of Historic Places.

A Memorandum of Agreement is currently being negotiated among the Corps, Cowlitz County, the Washington Department of Archaeologic and Historic Preservation, the City of Longview, the Bonneville Power Administration, the National Park Service, potentially affected Native American tribes, and Millennium in a separate federal process. The Memorandum may resolve this impact in compliance with Section 106 of the National Historic Preservation Act of 1966. However, there is no indication when or if this Memorandum will be signed by all parties. Without the Memorandum, the impacts to the Reynolds Metal Reduction Plant Historic District are considered adverse, significant, and unavoidable.

Demolition of historic properties without mitigation is inconsistent with the following Ecology SEPA policies:

- Fulfill the responsibilities of each generation as trustee of the environment for succeeding generations.
- Preserve important historic, cultural, and natural aspects of our national heritage.

9. **Tribal Resources.** The FEIS found that construction and operation of the Millennium coal export terminal could result in unavoidable indirect impacts on tribal resources. Tribal resources refer to tribal fishing and gathering practices and treaty rights. These resources may include plants or fish used for commercial, subsistence, and ceremonial purposes.

Construction activities such as building new docks, river bottom dredging, and pile driving would cause physical and behavioral responses in fish that could result in injury, and would affect aquatic habitat. Fish stranding associated with wakes from the additional 1,680 vessel trips per year would also cause injury. Eulachon would potentially be impacted by the initial and maintenance sediment dredging.

Fugitive coal dust particles generated by the Millennium operations and additional trains would enter the aquatic environment through movement of coal into and around the Project area and during rail transport. Fugitive coal dust and potential spills would increase suspended solids in the Columbia River.

These impacts could reduce the number of fish surviving to adulthood and returning to Zone 6 of the Columbia River, and could affect the number of fish available for harvest by Native American Tribes.

The increase in 16 additional Millennium-related trains per day travelling through areas adjacent to and within the usual and accustomed fishing areas of Native American Tribes would restrict access to 20 tribal fishing sites set aside by the U.S. Congress above Bonneville Dam in the Columbia River. There are additional access sites that are not mapped that would also be impacted.

To reduce impacts to tribal resources from construction, Millennium could be required to minimize underwater noise during pile driving, conduct advance underwater surveys for eulachon prior to in-water work, and conduct fish monitoring prior and during dredging.

These mitigation steps are inadequate because although noise impacts from construction would be reduced, they would not be eliminated, and fish behavior could be altered and affect the number of fish available for harvest by Native American Tribes.

Improving rail infrastructure for access to tribal fishing sites along the Columbia River above Bonneville Dam is outside the control of Millennium. The additional Project-related trains travelling through areas adjacent to and within the usual and accustomed fishing areas of Native American Tribes could restrict access to tribal fishing areas in the

Columbia River. Because other factors besides rail operations affect fishing opportunities, such as number of fishers, fish distribution, and the timing and duration of fish migration periods, the extent to which Project-related rail operations would affect tribal fishing is difficult to quantify. However, SEPA policies state that "presently unquantified environmental amenities and values will be given appropriate consideration in decision making along with economic and technical considerations." Consistent with this policy, Ecology concludes that Millennium at full operations would result in unavoidable significant adverse impacts to tribal resources.

Impacts to tribal resources are inconsistent with the following Ecology SEPA policies:

- Fulfill the responsibilities of each generation as trustee of the environment for succeeding generations.
- Preserve important historic, cultural, and natural aspects of our national heritage.
- The department shall ensure that presently unquantified environmental amenities and values will be given appropriate consideration in decision making along with economic and technical considerations.

III. SECTION 401 WATER QUALITY CERTIFICATION

Pursuant to Section 401 of the Clean Water Act, in order for Ecology to issue a water quality certification it must have reasonable assurance that the Project as proposed will meet applicable water quality standards and other appropriate requirements of state law. Consequently, an applicant must submit adequate information regarding a project for agency review before Ecology can determine compliance with the state water quality standards and other applicable regulations. Millennium's current application and supplemental documents fails to demonstrate reasonable assurance in the following areas:

A. Wetlands Impacts and Mitigation

The Project would impact (fill) 32.31 acres of wetlands, 8.1 acres of which occurred prior to Millennium's tenancy of the site, and 0.11 of which would be impacted at the mitigation site. The impacts include 28.32 acres of Category III wetlands and 3.99 acres of Category IV wetlands. For the reasons stated below, Millennium failed to demonstrate that the impacts and mitigation associated with the wetlands within the Project area will comply with Washington State water quality standards. Thus, Millennium failed to demonstrate reasonable assurance that the Project will meet water quality standards.

1. **Mitigation Plan.** The draft wetland mitigation plan is inadequate and does not demonstrate that the proposed mitigation will offset the Project's wetland impacts. Millennium submitted a conceptual mitigation plan to Ecology on June 8, 2017 (*Millennium Coal Export Terminal, Longview, Washington Coal Export Terminal including Docks 2 and 3 and Associated Trestle Conceptual Mitigation Plan—Wetlands and Aquatic Habitat*, dated May 25, 2017). In response to Ecology's questions,

Millennium submitted additional information on September 20, 2017. However, the submitted information continues to be deficient because it lacks an adequate credit/debit analysis, a boundary verification, and adequate hydrologic information regarding the mitigation site.

2. **Wetland Boundaries at the Impact Site.** Millennium has not demonstrated that the boundaries of the wetlands to be impacted have been verified by the Corps. There is no jurisdictional determination (JD) from the Corps stating whether the wetlands are waters of the United States or whether the Corps agrees with the boundaries as shown in the delineation report (Millennium Coal Export Terminal, Longview, Washington, Coal Export Terminal Wetland and Stormwater Ditch Delineation Report – Parcel 619530400, dated September 1, 2014). Millennium's application therefore does not adequately quantify the extent of the wetland impacts and does not adequately demonstrate that the proposed mitigation will offset those impacts.

3. **Credit-Debit Analysis.** This analysis is needed to determine whether proposed mitigation would adequately offset the Project's wetland impacts. It is especially important for a project of this scale, and where the impacted wetlands were rated using what is now an outdated version of the wetland rating system. The credit-debit analysis Millennium submitted to Ecology on September 20, 2017, did not include scoring forms for any of the wetlands to be impacted. Without these forms, Ecology cannot evaluate the credit-debit analysis. Millennium has not provided a complete analysis to Ecology, thereby failing to demonstrate that the proposed mitigation would be adequate.

4. **Hydrologic and Soil Investigations.** The conceptual mitigation plan states that: "The nature of this surface water will be further investigated as part of planned hydrologic investigations to support final Site design." The plan further states that "hydrologic data are being collected." The plan also states that: "Additional, site-specific soil investigations are planned at the Mitigation Site to inform final mitigation design." Millennium has not provided the results of these hydrologic and soil analyses to Ecology. In its September 20, 2017, responses to Ecology's questions about the proposed mitigation site, Millennium stated that it is still in the process of collecting hydrologic and soil data and that it will submit a technical report once compilation of the data has been completed. Because Millennium has not submitted detailed information supported by data about the hydrologic and soil conditions at the proposed mitigation site, Millennium has not demonstrated that the site is suitable and can provide adequate mitigation.

B. Stormwater and Wastewater

Sufficiently detailed information and analyses necessary to understand, evaluate, and condition wastewater and stormwater discharges are needed to assure compliance with Washington State water quality. Without complete information such as that noted below, Ecology does not have reasonable assurance that the Project will meet water quality standards.

1. **Wastewater Characterization.** Wastewater characterization information is necessary for Ecology to evaluate the impact of discharges from the Project on the receiving water (surface water, ground water, and sediments) and to determine the need for effluent limits, monitoring requirements, and other special conditions to ensure that the Project will meet state water quality standards. This information is typically required in an application for a National Pollutant Discharge Elimination System (NPDES) permit (WAC 173-220-040 and 40 C.F.R. § 122.21).

In response to Ecology's requests, Millennium submitted additional information on September 20, 2017. However, the submittals still do not provide detailed information to adequately characterize process wastewater and stormwater that will be generated at the site, including:

- Sources of wastewater (points of generation).
- Estimated wastewater volumes.
- Estimated pollutant concentrations.

2. **All Known, Available and Reasonable Methods of Prevention, Control and Treatment (AKART) and Engineering Reports.** AKART is required by three state statutes dealing with water pollution and water resources (Chapter 90.48 RCW, Chapter 90.52 RCW, and Chapter 90.54 RCW) and the state NPDES regulations that implement these laws (WAC 173-220). These laws and regulations state that in order to ensure the purity of all waters of the state and regardless of the quality of the waters of the state, discharges must be treated with all known, available, and reasonable methods of prevention, control, and treatment.

Chapter 173-240 WAC requires submittal of engineering reports and plans for new and modified industrial wastewater conveyance, discharge, and treatment facilities. Industrial wastewater includes contaminated stormwater. Ecology uses the information in the engineering report to determine whether AKART is being met and to ensure that effluent from the Project will meet applicable effluent limitations to protect aquatic life.

Millennium's submittals, including the submittal of September 20, 2017, did not provide sufficient information to determine whether AKART will be met for both process wastewater and stormwater generated from the Project. The following is a list of information deficiencies:

- The current AKART analysis does not address the wastewater generated during construction and operation of the Project (i.e., the current AKART analysis addresses only existing Millennium operations).
- Specific best management practices (BMPs) for stormwater management on site, at and near rail lines, and for rail car unloading were not provided.
- Engineering reports were not submitted for the following:

- Stormwater collection and treatment facilities (including dock and trestle).
- The new wastewater treatment system.
- Any proposed modifications to the existing wastewater treatment system.
- Changes to hydraulic loading through the existing wastewater treatment system and through the conveyance and outfall structures.

3. **Mixing Zone.** Ecology may authorize a mixing zone to meet water quality criteria once it has been determined that AKART has been met (WAC 173-201A-400). Water quality criteria must be met at the edge of a mixing zone boundary. Ecology uses the dilution factors determined for each mixing zone in analyzing the potential for violation of water quality standards and to derive effluent limitations as necessary.

Millennium's submittals did not provide updated mixing zone information, which Ecology would need in order to determine potential to violate water quality standards. Missing information includes a new mixing zone analysis to evaluate changes in dilution factors due to changes in the final effluent at Outfall 002A and updated receiving water information.

4. **Construction.** Contaminated stormwater and ground water will be generated during construction of the Project. Ecology needs sufficient information to evaluate the impact of construction activities and the discharges from these activities on waters of the state. This is information that is necessary for reasonable assurance and to demonstrate AKART as discussed above.

Millennium's submittals provided very little information concerning the unique construction of the Project. Missing information includes the following:

- How compaction of soils will potentially impact groundwater and surface water.
- Specific construction BMPs.
- Construction stormwater and groundwater characterization information, including estimated volumes and pollutant concentrations.
- Whether construction wastewater will be adequately treated.

5. **Antidegradation.** The Clean Water Act requires that state water quality standards protect existing uses by establishing the maximum levels of pollutants allowed in state waters. The antidegradation process helps prevent unnecessary lowering of water quality. Washington State's antidegradation policy follows the federal regulation guidance and has three tiers of protection. Tier II (WAC 173-201A-320) is used to ensure that waters of a higher quality than water quality criteria are not degraded unless such lowering of water quality is necessary and in the overriding public interest. A Tier

II analysis must be conducted for new or expanded actions when the resulting action has the potential to cause a measurable change in the physical, chemical, or biological quality of a water body.

Millennium's submittals did not include a detailed Tier II analysis for process wastewater and stormwater to determine whether the Project has the potential to cause measurable degradation at the edge of the chronic mixing zone.

Ecology notified Millennium during various meetings, conference calls, and site visits during 2017 (June 8, June 19, June 28, August 16, August 29, and September 8, 2017) that detailed information regarding the stormwater and process wastewater would need to be submitted to Ecology in order to provide reasonable assurance that the discharges from the Project would meet state water quality standards.

C. Water Rights

The Millennium proposal includes operational descriptions for ongoing reuse of stormwater for industrial dust control. If stormwater is collected and reused for a beneficial use, a water right permit would be required in accordance with Chapter 90.03 RCW.

The Millennium property formerly supported the Reynolds aluminum smelter. During the operations as an aluminum smelter, Reynolds had three water right claims and six water right certificates with a combined total annual quantity (Qa) of 31,367 acre-feet per year at a withdrawal rate of 23,150 gallons per minute (Qi). The Reynolds smelter closed in 2000.

These claims and certificates are now owned by Northwest Alloys, who purchased the property from Reynolds in the early 2000s. No information has been provided to Ecology that documents continued beneficial use of water since about the early 2000s.

In December 2016, Ecology met with Millennium and requested records and other relevant information to document what the current and recent water uses have been on the Millennium property. To date, Millennium has not provided this information. If these water rights have been partially or fully relinquished, Millennium would need to apply for and obtain the necessary water rights to legally put water to beneficial use at the Project site for its proposed operations.

As of September 26, 2017, no information has been provided by Millennium to Ecology in order to quantify the extent and validity (or continued beneficial use) of the existing water rights that are appurtenant to the property, and no water right application(s) have been received by Ecology requesting any new use of water or change in beneficial use(s) of water.

Without a water right, Ecology does not have reasonable assurance that Millennium will be able to legally carry out its proposal.

D. Toxics Cleanup

The proposed location for the Project is the former Reynolds Metals aluminum smelter site. This is a Model Toxics Control Act cleanup site. The principal contaminants are fluoride, polycyclic aromatic hydrocarbons (PAHs), cyanide, and total petroleum hydrocarbons (TPHs). Millennium and Northwest Alloys (a subsidiary of Alcoa) are potentially liable persons (PLPs) for the site. Alcoa owns the property. Millennium leases the property from Alcoa. The PLPs have been working to define the extent of the contamination at the site and evaluate the potential cleanup alternatives. Public notice of a draft cleanup action plan outlining the proposed cleanup was issued in March 2016. Ecology has been working with the PLPs to provide additional sampling along the Columbia River to address comments received on the draft cleanup action plan. To date, the cleanup action plan and consent decree have not been finalized.

Portions of the Project's infrastructure are located on contaminated soil and a historic landfill at the site. The majority of the site contains contaminated ground water. Proposed construction and operation of the Project would likely alter the migration of contaminated ground water at the site. The ballast that will be used during construction could force ground water to the surface with potential for discharge to the Columbia River.

Millennium's submittals do not provide sufficient information to evaluate the impact of the potential discharge of contaminated stormwater and ground water during the construction and operation of the Project. As a result, Millennium failed to demonstrate reasonable assurance that the Project will meet water quality standards.

YOUR RIGHT TO APPEAL

You have a right to appeal this Denial Order to the Pollution Control Hearings Board (PCHB) within 30 days of the date of receipt of this Denial Order. The appeal process is governed by Chapter 43.21B RCW and Chapter 371-08 WAC. "Date of receipt" is defined in RCW 43.21B.001(2).

To appeal you must do all of the following within 30 days of the date of receipt of this Order:

- File your appeal and a copy of this Denial Order with the PCHB (see addresses below). Filing means actual receipt by the PCHB during regular business hours.
- Serve a copy of your appeal and this Denial Order on Ecology in paper form—by mail or in person. (See addresses below.) E-mail is not accepted.

You must also comply with other applicable requirements in Chapter 43.21B RCW and Chapter 371-08 WAC.

ADDRESS AND LOCATION INFORMATION

Street Addresses	Mailing Addresses
Department of Ecology Attn: Appeals Processing Desk 300 Desmond Drive SE Lacey, WA 98503 **Pollution Control Hearings Board** 1111 Israel RD SW, Suite 301 Tumwater, WA 98501	**Department of Ecology** Attn: Appeals Processing Desk PO Box 47608 Olympia, WA 98504-7608 **Pollution Control Hearings Board** PO Box 40903 Olympia, WA 98504-0903

Maia D Bellon, Director
Department of Ecology

9/26/17
Date

Senator CARPER. Thank you, sir.

And finally, a question. This would be a question for our Governors, Governor Gordon and Governor Stitt.

One of the most controversial pieces of the EPA's proposal is that Federal agencies would be able to veto or override State imposed water quality conditions. For the sake of argument, let's say that a State is reviewing an application for a hydroelectric dam, which could have serious impacts on ecologically and economically important fish and species.

As a condition for the dam's 401 certification, the State environment department could require the project to implement fish passage measures to allow spawning fish to swim upstream. Under this new rule, the Federal agency permitting or licensing this project could decide this measure is too costly and veto this condition.

And I would just ask a question of both of you, if I could, as Governors of States whose recreational fishing industries support, literally thousands—maybe tens of thousands—of jobs, and provides billions of dollars to States' economies, would you support such a Federal agency override of your efforts to protect recreational fishing?

Governor Gordon. Want to take a shot at that?

Mr. GORDON. Thank you, Mr. Chairman, Senator Carper. I would not support a Federal override. We are—and I am on the record stating that I do not believe a Federal override is a correct method.

Senator CARPER. Thank you.

Governor Stitt.

Mr. STITT. I would agree with that. We want certainty. I think businesses want certainty, so we are looking at a time and scope around this proposed rule change, which we agree on.

Senator CARPER. All right.

Thank you both, thank you, all three of you.

[The prepared statement of Senator Carper follows:]

STATEMENT OF HON. THOMAS R. CARPER,
U.S. SENATOR FROM THE STATE OF DELAWARE

Mr. Chairman, we are here today to examine legislation that would restrict State authorities under Section 401 of the Clean Water Act.

As a former and now "recovering" Governor, I understand the reasons a State would want to maximize the strength of its most important industries. And so, I understand the motivations behind the legislation you have authored, Mr. Chairman, as well as the statements of the two Governors sitting before us today.

My hope is that all of us on both sides of the dais will similarly consider the concerns raised about both this legislation and EPA's proposed rule by the Governors, attorneys general, and environmental agencies of many other States, including both red and blue States.

As I consider these reforms, some questions come to mind that are partly a legacy of my experience as a Governor:

- In addressing the needs of the industries in one State, what effect would the proposed cure have on neighboring States?
- Do other States perceive the same problems the Governors here today have articulated?
- How do the 45 tribes authorized to review permit applications on their lands feel about the proposed solutions?

I ask these questions because in my State of Delaware, decisions made in the best interest of industries and States elsewhere have had dramatic effects on the environment, public health, and our quality of life.

As I have described many times in this Committee, Delaware sits at the end of America's tailpipe. More than 90 percent of our State's air pollution flows from power plants upwind of our State.

Despite many appeals from Delaware and other downwind States, unfortunately, neither the responsible States nor EPA have chosen to control those emissions.

While I understand the economic motivations of those States, Delawareans are forced to endure poorer health and higher costs while upwind polluters enjoy economic benefit. That is not right.

I would just ask my colleagues and our witnesses to imagine how they would feel if someone wanted to locate a power plant in the headwaters of that State's iconic cold water trout stream? Or perhaps a dam that would harm water quality, and as a consequence, critical wildlife and fisheries habitats? Would you want your State to have a say in whether and how that activity is conducted in your State?

How would you feel about a Federal agency in Washington, DC, overruling the judgment of your own State officials regarding local impacts? Would you care if a Federal agency dismissed your concerns, told you that you had functionally waived your right to assess a project, and stormed ahead with a project that local citizens opposed because of local adverse impacts?

These questions may seem hypothetical, but actually, they are the very real questions that Governors will face if EPA's proposed revisions to the 401 certification process become the law of the land. Indeed, they are the questions that Governors, attorneys general, State environmental directors, and a host of other concerned citizens are already facing now as they consider the proposed regulation.

As a recovering Governor, I wonder what other States and tribes feel about the proposed changes. Apparently, President Trump was also interested in State and tribal input.

In his April 16, 2019, Executive Order on Promoting Energy Infrastructure and Economic Growth, the President specifically called on EPA to, "consult with States, tribes, and relevant executive departments and agencies in reviewing section 401 of the Clean Water Act and EPA's regulations and guidance."

As it turns out, however, States and tribes were either not effectively consulted or they were blatantly ignored. And from our analysis of the comments received on EPA's proposed 401 certification rule, States and tribes across the board really do not like it.

More specifically, as this chart shows, 29 State environmental agencies and the District of Columbia expressed significant concerns with the proposed change to their authorities. These are not just Washington, New York, and others you might consider the usual suspects. As you can see here, Utah, South Dakota, Idaho, Arkansas, and others expressed substantial and heartfelt concern about the regulation.

As you can see in this other chart, tribes are nearly unanimously opposed to what the Administration has proposed.

While I can't do justice to all the concerns the States and tribes expressed, a comment from the State of South Dakota Department of Environment and Natural Resources struck me:

> "Simply put, these proposed changes supplant the cooperative federalism to protect water quality that has existed since Congress passed the Federal Clean Water Act. These changes are a poorly disguised effort by the Federal Government to severely limit the States' and tribes' efforts to enforce their water quality standards and to impose appropriate conditions on federally issued permits."

Mr. Chairman, I understand the desire and mandate we have as elected officials to take care of our people and economies in our States.

What I do not understand is why, in the process, we have to undermine other States' abilities to take care of themselves, their own citizens' welfare, their own natural environments, and their own local economic interests. That is what is proposed here. Not only is it wrong, it's also not our only option to address whatever real concerns these players have.

In reality, denials of certifications by States are exceedingly rare. If one digs deeply enough into most of those denials, many of them occurred because the applicant did not give State officials the information necessary to determine whether the project would compromise the State's water quality and comply with State laws.

As many States suggested in their comments on the proposed EPA rule, early engagement with State agencies and an honest portrayal of projects and their impacts makes it possible to resolve problems and secure certification. This is the way it works in virtually every one of the thousands of certifications that States provide each year.

Granted, there are major projects that are so large, so disruptive, and so complex that they may never be appropriate for the environment for which they are proposed. A good example was a proposed deep water coal port in my State of Delaware that would have displaced some of the most beautiful and ecologically productive coastal marshes you will find anywhere. For very good reasons, our State determined that this location was not the right place for that kind of activity.

Any and every State should have the right to make that determination for itself, accountable to its own citizens. That was the motivation of Congress when it gave States the important tool of 401 certifications in the Clean Water Act—an authority that breathes life into the Act's promise of cooperative federalism. That, provided minimum Federal standards are met, States are in the best position to determine how to take care of their environments—much less their economies.

As much as I know you, the majority witnesses, and some of my colleagues around this dais believe your legislation and EPA's proposed 401 certification regulation are a good thing, I—and a majority of States in this union—disagree.

We are debating a huge and dangerous solution to a very narrow problem affecting a very minute part of our society.

This bill and that regulation are not the answer.

Thank you, Mr. Chairman.

Senator BARRASSO. Thank you, Senator Carper.

Before turning to Senator Gillibrand, I would first like to submit for the record a unanimous consent request to enter into the record a brief filed by the Crow Nation and the National Tribal Energy Association, and a number of associations, opposing the State of Washington's denial of the Millennium Bulk Terminal Project.

I would also like to enter into the record the Millennium Bulk's response to the State of Washington's 2018 letter to the Committee, which we have just introduced into the record.

Without objection, that will also be submitted.

[The referenced information follows:]

No. 19-35415

In the

United States Court of Appeals

for the

Ninth Circuit

LIGHTHOUSE RESOURCES INC., et al.,
Plaintiffs-Appellants,

BNSF RAILWAY COMPANY,
Intervenor-Plaintiff-Appellant,

– v. –

JAY ROBERT INSLEE, in his official capacity as Governor of the State of Washington, et al.,
Defendants-Appellees,

WASHINGTON ENVIRONMENTAL COUNCIL, et al.,
Intervenor-Defendants-Appellees.

On appeal from the United States District Court for the Western District of Washington, Case No. 3:18-cv-05005, Hon. Robert J. Bryan

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BRIEF OF AMERICAN FUEL & PETROCHEMICAL MANUFACTURERS, ASSOCIATION OF AMERICAN RAILROADS, CROW NATION, NATIONAL ASSOCIATION OF MANUFACTURERS, NATIONAL MINING ASSOCIATION, AND NATIONAL TRIBAL ENERGY ASSOCIATION AS *AMICI CURIAE* SUPPORTING PLAINTIFFS-APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

No *amicus* signing this brief has a parent corporation, and no publicly held corporation owns 10% or more of any of any *amicus*'s stock.

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INTEREST OF THE *AMICI CURIAE*

The American Fuel & Petrochemical Manufacturers (AFPM) is a national trade association whose members comprise virtually all refining and petrochemical manufacturing capacity in the United States. AFPM's members supply consumers domestically and internationally with a wide variety of products that are used daily in homes and business. Among its other missions, AFPM engages in legal advocacy on issues important to its members.

The Association of American Railroads (AAR) is an incorporated, nonprofit trade association comprised of freight and passenger railroads. AAR's freight members operate 83 percent of the line haul mileage, employ 95 percent of the workers, and account for 97 percent of the freight revenues of all railroads in the United States. Its passenger rail members operate intercity passenger trains and provide commuter rail services. Together, AAR's member railroads operate a rail system that spans North America and links to a globalized goods movement network.

The Crow, or Apsaalooke, Nation is a federally-recognized tribe in Montana with an enrolled membership of 14,000. With a 75% unemployment rate, the Crow Nation must generate revenue to provide jobs and services for tribal members. The Crow Nation has an abundance of natural resources ready to be developed, including 18 billion tons of exportable coal, which

represents ten percent of the United States' coal reserves, and three percent of the world's. The Crow Nation has a significant interest in developing and exporting its coal resources.

The National Association of Manufacturers (NAM) is the largest manufacturing association in the nation, representing small and large manufacturers in every industrial sector in all 50 states. U.S. manufacturers employ more than 12 million men and women, contribute $2.25 trillion to the U.S. economy annually, have the largest economic impact of any sector of the American economy, and account for more than three-quarters of nationwide private-sector research and development. The NAM is the voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

The National Mining Association is a national trade association whose members produce most of America's coal, metals, and industrial and agricultural minerals. Its membership also includes manufacturers of mining and mineral processing machinery and supplies, transporters, financial and engineering firms, and other businesses involved in the nation's mining industries.

The National Tribal Energy Association is a national tribal organization that represents the top energy producing tribes. Together, these tribes

represent over 300,000 individual members who rely directly on the continued production of energy, as well as the uninterrupted flow of energy products to their customers. The Association's principal mission is assisting and advocating for the development and exportation of tribal energy resources. The Indian Commerce Clause (U.S. Const. art. I, sec. 8, cl. 3) provides strong constitutional support for the unimpeded exportation of tribal energy resources.

Amici—each of which is directly impacted by national policies regarding the mining, transportation, or use of coal—have a substantial interest in the proper resolution of this appeal. Defendants seek to block construction of the Millennium Bulk Terminal, because of their policy disagreement regarding the worldwide use of coal. In this way, defendants—State officials—seek to countermand foreign trade initiatives. Tolerance of such obstruction would hurt American workers, inhibit American economic growth, and violate the Constitution's command that the federal government serve as the sole representative of the United States in foreign trade and foreign affairs.

INTRODUCTION AND SUMMARY OF ARGUMENT

Defendants in this case—high-ranking policymakers for the State of Washington—have steadfastly refused to allow construction of a coal export facility at the Millennium Bulk Terminal near the Port of Longview. They have done so not to protect legitimate local interests, but because they oppose

the use of coal as an energy source throughout the world. Their avowed goal is to inhibit the exportation of American coal and to slow its consumption in global markets. In attempting to control American foreign policy in this way, Defendants have overstepped the constitutional limitations on their authority.

The Constitution allocates exclusive authority over international trade to the federal government. And it does so for good reason: International trade not only impacts the entire nation's economy, but it is a critical tool—both a carrot and stick—in the executive's dealings with foreign allies and adversaries alike. The common-sense corollary of the Constitution's allocation of exclusive authority to the federal government over foreign commerce is its denial of that authority to the states. States may not, therefore, disrupt uniform federal policy regarding foreign trade or impose burdens on foreign trade that outweigh local benefits.

Defendants' actions here violate both of those proscriptions. *First*, blocking construction of a major export facility would undermine the uniformity of federal trade policy, which is to encourage the export of coal—both for the benefit of American producers (who rely on exports for billions of dollars in job-creating income) and of the United States' allies in Asia (who rely on American exports as a critical source of energy). *Second*, defendants' actions fail the Commerce Clause's *Pike* balancing test because there is no

appreciable local benefit of their conduct. Rather, defendants are overtly promoting their own, preferred international environmental policy interests in preventing the use of coal for energy.

The district court effectively allowed defendants to continue with their obstructionist behavior. It held that a decision of Washington's Pollution Control Hearings Board denying the terminal a Clean Water Act permit would have preclusive effect here. The court held further that, as to any issues not precluded, a stay is warranted under the *Pullman* abstention doctrine, in favor of a state court appeal from that decision. This Court should reverse the lower court's orders for all of the reasons given in the appellants' opening brief: The issues being resolved in the state and federal forums are different, and the prerequisites for abstention—an "extra-ordinary" remedy—are not present here. *See* Opening Br. 19-36.

Amici file this brief to address the importance of the underlying merits. If undisturbed, the district court's decision will stand as an invitation for states to adopt their own foreign policy, in contradiction of constitutional safeguards. The result would be a damaging disruption to national and international trade policies of all sorts.

ARGUMENT

I. STATE AND LOCAL INTERFERENCE WITH FOREIGN TRADE UNDERMINES A UNIFORM FOREIGN POLICY AND IS HARMFUL TO THE NATIONAL ECONOMY

A. Trade plays an important role in America's foreign policy

International trade is the lifeblood of the American economy. As the world's largest exporter and importer of goods and services, with total exports of nearly $2.3 trillion in 2013 (*see* Office of U.S. Trade Representative, *Benefits of Trade*, perma.cc/4UP6-TUW7), the United States depends on trade relationships and trade facilities to help American goods find their way to buyers around the world and to bring critical resources and investment to the United States. As of 2013, America's exports supported nearly 5,600 jobs per $1 billion exported, including an estimated 25% of all American manufacturing jobs. *Id.* These benefits enrich Americans in every industry across the country.

1. The United States' abundant energy resources are critical to the country's export trade. Energy exports have accounted for a substantial part of U.S. economic growth in recent years, contributing significantly to the nation's annual real GDP growth from 2006 to 2013. *See* Craig S. Hakkio & Jun Nie, *Implications of Recent U.S. Energy Trends for Trade Forecasts*, Fed. Reserve Bank of Kan. City, 5 (2014), perma.cc/V3FC-24W8; U.S. Bureau of Econ. Analysis, *Gross Domestic Product: Percent Change from Preceding*

Period, perma.cc/8WJR-MBYZ. American energy exports have been fueled in no small part by coal exports, which grew by 68% between 2016 and 2017 alone. *See* U.S. Energy Info. Admin., *U.S. Coal Exports*, perma.cc/E4GA-KTKG. For every million tons of coal exported, an estimated 1,320 jobs are created; expenditures on downstream transportation services related to coal exports supported another 8,850 jobs in 2011. Ernst & Young, *U.S. Coal Exports: National and State Economic Contributions*, i-ii (May 2013), perma.cc/6VE6-AKPL.

Against this background, the proposed coal export facility would be a substantial economic boon to Washington and to the rest of the country. These local and national economic benefits are why Congress has made it a national priority for more than two decades to increase exports of American-mined coal and directed the Commerce Department to prepare plans for encouraging these exports. *See* 42 U.S.C. § 13367(a).

2. In addition to its domestic economic benefits, America's international trade is an essential foreign policy tool for the United States to advance its interests around the world. By providing economic assistance to our allies, while denying it to our adversaries, the United States can strengthen the community of democratic nations economically and foster ties of cooperation and respect between those nations and the United States.

The federal government has made energy exports a key foreign policy focus. These efforts have been particularly significant in the coal sector, where the Department of the Interior has moved to facilitate more leases of federal land for coal development (*see* U.S. Dep't of Interior, Concerning the Federal Coal Moratorium, Order No. 3348 (Mar. 29, 2017), perma.cc/HZW5-3RYU) with the express goal of "assist[ing] our allies with their energy needs." Press Release, U.S. Dep't of Interior, Secretary Zinke Takes Immediate Action to Advance American Energy Independence (Mar. 29, 2017), perma.cc/F5NH-PK6L.

These energy exports are critically needed in Asia, where our international allies including Japan and South Korea have strong demand for American energy. *See, e.g.*, Qinnan Zhou, *The U.S. Energy Pivot: A New Era for Energy Security in Asia?*, Woodrow Wilson Int'l Ctr. for Scholars (Mar. 26, 2015), perma.cc/5CXZ-LNKT. And in order to reach Asian markets, coal producers must have access to export facilities on the West Coast—which is why the federal government's current National Security Strategy states that it is critical for the United States to give "continued support of private sector development of coastal terminals" for energy exports. The White House, *National Security Strategy of the United States of America*, 23 (Dec. 2017), perma.cc/QLU5-WR4J.

3. The implications of permitting Washington to interfere with foreign trade in coal would reach far beyond the energy industry. Numerous other American industries rely on foreign trade, including agriculture, which has posted an annual trade surplus for over 50 years and contributed more than $138 billion to American exports in 2017 (*see* Office of U.S. Trade Representative, *2018 Fact Sheet: USTR Success Stories: Opening Markets for U.S. Agricultural Exports*, perma.cc/G8WF-U8DY); the manufacturing sector, which produced an astonishing $1.2 trillion in exports in 2016 (*see* Nat'l Ass'n of Mfrs., *United States Manufacturing Facts* 2 (revised Jan. 2018), perma.cc/-U8AV-NGVT); and the freight rail industry, which depends on international trade for 35% of annual rail revenue and 50,000 rail jobs worth $5.5 billion in annual wages and benefits (*see* Ass'n of Am. Railroads, *Freight Railroads & International Trade* 2 (Mar. 2017), perma.cc/V9DL-8X63). Each of these trade-reliant economic sectors makes critical contributions to the American economy and to relationships with America's trading partners. The United States has a strong interest in ensuring that exports in these sectors remain strong and uninhibited by local interference.

B. State and local interference impede the federal prerogative to establish and implement uniform foreign policy

It is not difficult to see how and why interference like Washington's undermines the federal government's plenary control over the nation's trade

policy. "Foreign commerce," as the Supreme Court has repeatedly recognized, "is pre-eminently a matter of national concern." *Japan Line, Ltd. v. L.A. Cty.*, 441 U.S. 434, 448 (1979). "In international relations and with respect to foreign intercourse and trade[,] the people of the United States act through a single government with unified and adequate national power." *Bd. of Trustees of Univ. of Ill. v. United States*, 289 U.S. 48, 59 (1933).

The rationale for this approach is self-evident: The federal government representing the interests of citizens from every state, is best positioned to balance the interests of that nation's many different regions and to balance domestic goals with foreign policy objectives. The Constitution's design reflects this clear preference for federal policymaking in the realm of foreign trade and foreign affairs. Thus, while the Constitution grants Congress power to regulate both domestic and foreign commerce, "there is evidence that the Founders intended the scope of the foreign commerce power to be the greater" of the two. *Japan Line*, 441 U.S. at 448 & n.12 (collecting authorities).

It would be impossible for the federal government to speak with a single voice on behalf of the nation in foreign affairs and international trade if individual states and their municipalities could adopt their own policies that contradict or otherwise interfere with federal policy. When states attempt to influence international affairs through their own regulatory efforts and by pursuing their own local agendas, they at best create legal uncertainty and

burdens for international partners. At worst, they harm the national economy and frustrate the federal government's efforts to implement its foreign policy altogether—just as Washington has sought to do here.

II. WASHINGTON'S ACTIONS VIOLATE THE FOREIGN COMMERCE CLAUSE

A. The Foreign Commerce Clause prohibits states from undermining uniformity in, or imposing disproportionate burdens on, foreign commerce

The Supreme Court has "held on countless occasions that, even in the absence of specific action taken by the Federal Government to disapprove of state regulation implicating interstate or foreign commerce, state regulation that is contrary to the constitutional principle of ensuring that the conduct of individual States does not work to the detriment of the Nation as a whole, and thus ultimately to all of the States, may be invalid under the unexercised Commerce Clause." *Wardair Can., Inc. v. Fla. Dep't of Revenue*, 477 U.S. 1, 7-8 (1986).

In its domestic-trade dormant Commerce Clause cases, "[t]he Supreme Court 'has adopted . . . a two-tiered approach to analyzing state economic regulation under the Commerce Clause.'" *Pharm. Research & Mfrs. of Am. v. Alameda*, 768 F.3d 1037, 1039-40 (9th Cir. 2014) (quoting *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 578-79 (1986)).

First, when a state or local law discriminates against interstate commerce by treating in-state or in-country economic interests more favorably

than out-of-state or out-of-country economic interests, the law "is virtually *per se* invalid." *Or. Waste Sys., Inc. v. Dep't of Envtl. Quality of Or.*, 511 U.S. 93, 99 (1994). As this Court has put it, if a state entity "1) directly regulates interstate commerce; 2) discriminates against interstate commerce; or 3) favors in-state economic interests over out-of-state interests[,] . . . it violates the Commerce Clause per se." *NCAA v. Miller*, 10 F.3d 633, 638 (9th Cir. 1993).

Second, when a state law "regulates evenhandedly" with only "incidental effects" on interstate or foreign commerce, the law is invalid under the Commerce Clause if "the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Or. Waste Sys.*, 511 U.S. at 99 (quotation marks omitted). In other words, if a facially neutral statute "has only indirect effects on interstate commerce," courts conduct a balancing test to determine if the burden on interstate commerce exceeds the local benefits. *S.D. Myers, Inc. v. City & Cty. of S.F.*, 253 F.3d 461, 466 (9th Cir. 2001).

Courts often rely on this general domestic-commerce framework to resolve dormant Commerce Clause cases involving international trade. *See, e.g., Kraft Gen. Foods, Inc. v. Iowa Dep't of Revenue & Fin.*, 505 U.S. 71, 81-82 (1992) (relying on interstate Commerce Clause decisions to inform the Court's foreign Commerce Clause analysis). At the same time, it is well understood

that the prohibitory power of the Commerce Clause is even stronger in the context of foreign commerce, with respect to which "a State's power is further constrained because of the special need for federal uniformity." *Barclays Bank PLC v. Franchise Tax Bd. of Cal.*, 512 U.S. 298, 311 (1994) (quotation marks omitted). Thus, "the constitutional prohibition" against state and local regulation of foreign commerce is even "broader than the protection afforded to interstate commerce" because "matters of concern to the entire Nation are implicated." *Kraft Gen. Foods*, 505 U.S. at 79; *accord, e.g.*, *Piazza's Seafood World, LLC v. Odom*, 448 F.3d 744, 749 (5th Cir. 2006) ("[T]he scope of Congress's power to regulate foreign commerce, and accordingly the limit on the power of the states in that area, is greater.").

For these reasons, and in light of the importance of uniform federal regulation in the area of foreign affairs, "a more extensive constitutional inquiry is required" to decide a dormant Commerce Clause challenge involving foreign commerce. *Japan Line*, 441 U.S. at 446. As this Court previously has put it, "when state regulations affect foreign commerce, additional scrutiny is necessary to determine whether the regulations 'may impair uniformity in an area where federal uniformity is essential,' or may implicate 'matters of concern to the whole nation . . . such as the potential for international retaliation.'" *Pac. Nw. Venison Producers v. Smitch*, 20 F.3d 1008, 1014 (9th Cir. 1994) (quoting *Japan Line*, 441 U.S. at 448, and *Kraft*

Gen. Foods, 505 U.S. at 79); *accord, e.g.*, Laurence H. Tribe, *American Constitutional Law* § 6-21, at 469 (2d ed. 1988) ("If state action touching foreign commerce is to be allowed, it must be shown not to affect national concerns to any significant degree, a far more difficult task than in the case of interstate commerce.").

According to this more demanding standard, a court must ask additionally whether a state or local law regulating foreign commerce threatens to "impair federal uniformity in an area where federal uniformity is essential." *Japan Line*, 441 U.S. at 448. Such laws "are invalid 'if they (1) create a substantial risk of conflicts with foreign governments; or (2) undermine the ability of the federal government to "speak with one voice" in regulating commercial affairs with foreign states.'" *Piazza's Seafood World*, 448 F.3d at 750 (quoting *New Orleans S.S. Ass'n v. Plaquemines Port, Harbor & Terminal Dist.*, 874 F.2d 1018, 1022 (5th Cir. 1989)). That is so regardless of local benefit. *Kraft Gen. Foods*, 505 U.S. at 79.

B. Washington's conduct violates these principles

The burden on foreign commerce from Washington's attempts to block the construction of the Millennium Bulk Terminal outweighs any benefit to Washington. And even if that were not so, the resulting disruption of the uniform federal policy favoring American energy exports more than justifies finding a Foreign Commerce Clause violation here.

1. Washington's actions interfere with the uniformity of federal policy.

The question whether the United States should export coal or any other good or commodity—and in what amounts—is an issue that falls squarely within the purview of the federal government. *See Japan Line*, 441 U.S. at 448. The federal government has taken the initiative to set policy for the nation in this area by prioritizing energy exports in general, and coal exports in particular, as key to the economic prosperity and national security of both the United States and its Asian allies.

Washington's actions regarding the proposed Millennium Bulk Terminal threaten to undermine this uniform federal policy. Geography dictates that, in order to export coal to Asia from Wyoming and Utah (or, indeed, most anywhere in the United States), a coal producer must have access to export facilities on the West Coast, including in Washington. But Washington has sought to block any such exportation within its jurisdiction by preventing coal export facilities such as the Millennium Bulk Terminal from being constructed. If such conduct were permissible, western states and cities could coordinate to frustrate federal energy and trade policy by blocking *all* coal exports to Asia—in effect, overriding the exportation policy for the entire nation.[1]

[1] This is not a speculative concern. Washington—along with Oregon, California, British Columbia, and the cities of San Francisco, Oakland, Los

This kind of direct interference with an express federal policy violates *Japan Line*'s "one voice" requirement. State laws have been held to violate the Commerce Clause where they merely articulated a foreign policy that tangentially diverged from the federal government's. *See, e.g.*, *Nat'l Foreign Trade Council v. Natsios*, 181 F.3d 38, 68 (1st Cir. 1999) (Massachusetts law restricting state's ability to transact with companies doing business in Burma prevented the federal government from speaking with one voice). If such laws are unconstitutional, *a fortiori* Washington's overt attempt to *block* a commodity's exportation is as well when the federal government has expressly *encouraged* its exportation.

2. Washington's actions impose burdens on foreign commerce that outweigh any local benefits.

Even under the more permissive *Pike* balancing test that applies to state actions under the domestic Commerce Clause analysis, Washington's attempt to block the construction of the Millennium Bulk Terminal is unconstitutional. *See United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid*

Angeles, Seattle, Portland, and Vancouver—is a member of the Pacific Coast Collaborative, an organization that aims to "[d]ramatically reduce greenhouse gas emissions" through state and local policies. *See* Pac. Coast Collaborative, *About*, perma.cc/Y67Y-FAXQ. It would be straightforward for these jurisdictions to coordinate their policies in order to block coal exports. Indeed, plaintiffs allege that they have done just that. *See* ER 222 (alleging that Washington policymakers have "coordinated with officials in Oregon and California in a 'subnational' effort to prevent any new coal exports from the United States Pacific Coast to Asian markets").

Waste Mgmt. Auth., 550 U.S. 330, 346 (2007). Whatever benefit accrues to Washington from blocking these exports, it does not outweigh the considerable practical and economic burdens on the rest of the country or on the nation's delicate relationships with foreign powers.

Washington's refusal to permit construction of the Millennium Bulk Terminal is blocking as much as $17 *billion* per year in gross domestic product for the states where the coal that would be exported is produced—a massive detriment to these states and communities. *See* Berkman Report 15-17 (Dkt. 265). Moreover, the proposed terminal facility is vital to the continued vitality of America's energy industry, given that there currently is insufficient port capacity on the West Coast to allow export of sufficient volumes of coal to meet our Asian allies' demands. *See* Schwartz Report 14-15 (Dkt. 277) (noting that the Terminal is the "only viable project" for new facilities for exporting coal to Asia and is thus "essential to the continued survival of coal mining in the western U.S."). Yet Washington seeks to unilaterally block this development, imposing an enormous burden on foreign trade.[2] In this way, Washington is leveraging its control over port facilities to improperly set energy and trade policy for the nation. And this case would be

[2] Ironically, blocking development of the Millennium Bulk Terminal would almost surely produce *higher* overall greenhouse gas emissions, as coal exports would be transported to less convenient locations for export.

just the tip of the spear. A decision upholding Washington's actions would be a green light to restrict other exports as well.

Washington must establish overwhelming local benefits to overcome the enormous costs of this interference on the national economy and withstand a Commerce Clause challenge. It plainly cannot. Indeed, development of the export facility would *benefit* Washington economically, producing substantial new tax revenues for the state and creating a significant number of new jobs and infrastructure opportunities in Cowlitz County, where the facility would be located. ER 216. Defendants' willingness to forgo these benefits and block development of the terminal suggests that their true motivation is an ideological opposition to coal exports in general, not a desire to benefit Washington specifically.

To be sure, some of Defendants' actions rested on purported environmental concerns about the project. But these environmental concerns are by all appearances pretextual. Washington's original environmental review of the project identified, at most, potential environmental issues that could readily be mitigated. But the state's final denial of a permit for the facility under Section 401 of the Clean Water Act "distort[ed]" those conclusions into predictions of certain environmental harm. Placido Decl. ¶¶ 14-15 (Dkt. 275). That kind of shift is the hallmark of motivated reasoning. Washington's true intent is to regulate international trade in coal—an aim that cannot satisfy

the Commerce Clause inquiry, which looks only to the "putative *local* benefits" of a state policy. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970) (emphasis added).

Defendants' misuse of their power to deny certification for the Millennium Bulk Terminal under Section 401 exemplifies the lack of local interests at stake here and—if allowed to stand—would pave the way for all kinds of obstructive conduct in violation of the Commerce Clause. Through the Clean Water Act, Congress sought to "recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate [water] pollution" (33 U.S.C. § 1251(b)), and Section 401 was "[o]ne of the primary mechanisms" by which it set out to achieve that goal. *Keating v. FERC*, 927 F.2d 616, 622 (D.C. Cir. 1991). Congress's intent in Section 401 was "to give the states veto power over the grant of federal permit authority for activities potentially *affecting a state's water quality*" (*United States v. Marathon Dev. Corp.*, 867 F.2d 96, 99-100 (1st Cir. 1989) (emphasis added)), preserving their role as the "prime bulwark in the effort to abate water pollution." *See United States v. Puerto Rico*, 721 F.2d 832, 838 (1st Cir.1983).

Under Section 401, an applicant for a Section 404 discharge permit must obtain a certification from the State that the proposed discharge will comply with the applicable water quality standards under the Act. 33 U.S.C. § 1341(a). Here, however, the denial of plaintiffs' application for certification

for the coal export facility had little if anything to do with the water quality provisions of the Act, or indeed with water quality issues at all. Nor could it have. In fact, Defendants were concerned with entirely different, wholly out-of-state environmental impacts from transporting the coal before and after export. This use of the Section 401 process to pursue interests that have nothing to do with water quality demonstrates that Defendants were not pursuing any putative "local benefit" when they blocked development of the export facility.

The implications of allowing states to hijack Section 401 for purposes unrelated to water quality would be disruptive to numerous sectors of the economy. If Washington can prohibit the export of coal by way of Section 401 permitting, states across the country could similarly restrict domestic and foreign trade. After all, the mining industry is not the only industry that depends upon state certifications under Section 401 in order to do business. Recent years have seen an "immense expansion of federal regulation of land use" under the Clean Water Act, with the relevant agencies asserting federal jurisdiction over "virtually any parcel of land containing a channel or conduit—whether man-made or natural, broad or narrow, permanent or ephemeral—through which rainwater or drainage may occasionally or intermittently flow." *Rapanos v. United States*, 547 U.S. 715, 722 (2006) (plurality opinion). Section 401 state certifications have accordingly become

necessary for significant numbers of real estate, infrastructure, and agricultural projects. Indeed, in many states, Section 404 and 401 approvals are broadly required for any project that may involve "dredg[ing], fill[ing] or otherwise alter[ing] the bed or banks of any stream, lake, wetland, floodplain or floodway"—which describes the vast majority of agricultural projects. *See* U.S. Army Corps of Eng'rs, *Permit Requirements for the State of Illinois* 1, perma.cc/6T6W-E5YM. This kind of political gamesmanship is not what Congress contemplated when it granted states the authority to review proposed projects for water quality issues in Section 401.

It also bears emphasis that Defendants have treated the Millennium Bulk Terminal facility differently from other development projects proposed during the same period. Defendants have *never* used their authority to deny a permit or certification to a project prior to doing so with respect to the Millennium Bulk Terminal. Dkt. 262 at 13-14. And a state official involved in the review of the Terminal explains that "if Millennium proposed to ship anything other than coal, [the state] would have granted the Section 401 water quality certification" here, as well. Placido Decl. ¶ 13. This pattern makes clear that Defendants' true intent—and the actual effect of their conduct—is to unilaterally manipulate U.S. energy policy and foreign trade practices rather than to regulate Washington's environment. The Commerce

Clause cannot abide that kind of preferential treatment with respect to foreign trade.

III. ALLOWING WASHINGTON'S ACTIONS TO STAND WOULD GIVE A GREEN LIGHT TO STATE AND LOCAL INTERFERENCE WITH FOREIGN TRADE POLICY

The clear unconstitutionality of Washington's actions is reason enough to reverse the district court's stay order, which wrongly gave preclusive effect to the rulings of the state pollution control board, and allow this case to proceed. But reversal is also warranted for a second reason: A ruling in the state's favor would invite states and municipalities across the country to interfere with U.S. foreign relations.

In light of the polarization of the American electorate, and the tendency of Americans to live near others who share their political views (see *generally* Bill Bishop, *The Big Sort: Why the Clustering of Like-Minded America Is Tearing Us Apart* (2008)), many state and local governments themselves have assumed polarized political characters. Whereas the bodies politic and state governments in California, Oregon, Maryland, and New Mexico are known to lean reliably in favor of progressive foreign and trade policy, for example, those in states like South Carolina, Texas, Montana, and Alaska are known to lean in the other direction. *See* Jeffrey M. Jones, *Red States Outnumber Blue for First Time in Gallup Tracking*, Gallup (Feb. 3, 2016), perma.cc/-EY5C-SYAZ; Shanto Iyengar, Gaurav Sood & Yphtach Lelkes, *Affect, Not*

Ideology: A Social Identity Perspective on Polarization, 76 Pub. Opinion Q. 405, 412-15 (2012); Alan I. Abramowitz & Steven Webster, *The Rise of Negative Partisanship and the Nationalization of U.S. Elections in the 21st Century*, 41 Electoral Stud. 12 (2016). Large municipal governments are often strongly polarized as well. *See, e.g.*, Anthony Williams, *Stop One-Party Rule in Big Cities*, CityLab (Oct. 15, 2017), perma.cc/6749-ZTYL.

Many border states and coastal cities can, to some degree, control American export trade with our foreign allies, including Mexico and Canada and those in Asia and Europe. If the Court allowed Washington's obstructionist conduct in this case, it would encourage counties and cities to use their geographic leverage over international trade to obstruct any policies with which they disagree. This is an equal-opportunity problem—just as Republican administrations can expect obstruction from Democratic-leaning states and cities, Democratic administrations can expect obstruction from Republican-leaning states and cities.

The results would be deeply harmful to national foreign trade policy and a clear offense to the nation's federalist scheme. West Coast port cities that disagree with how certain livestock are raised could block development of port facilities or infrastructure leading to such facilities in order to obstruct exports of meat and other animal products. *Cf. Missouri v. California*, No. 22O148 (S. Ct. filed Dec. 7, 2017), *motion for leave denied*, 2019 WL 113057

(Jan. 7, 2019) (suit by Missouri challenging California's efforts to limit the sale of non-cage-free eggs within California). Conversely, South Carolina municipalities that disagree with immigration policies essential to the labor supply needed for much of American manufacturing could attempt to deny Clean Water Act or other permits for rail facilities needed to export goods manufactured with such labor. *Cf. United States v. California*, 921 F.3d 865 (9th Cir. 2019) (United States' suit against California concerning immigration policy). And because virtually all international trade is bilateral, states or cities likewise could attempt to obstruct the *im*portation of such goods from our foreign allies based on similar policy objections.

It was precisely to prevent such state and local meddling with foreign trade policy that the Framers of the Constitution allocated exclusive authority over international trade and foreign policy to the federal government. Washington's conduct in this case is inconsistent with that framework. In this case, it is coal; in the next case, it could be agriculture or manufactured goods. This Court should not tolerate Washington's efforts to undermine the federal government's policy with respect to international trade in coal resources, just as it should not tolerate similar conduct in related contexts.

CONCLUSION

The district court's order should be reversed.

November 6, 2019

Respectfully submitted,

/s/ Michael B. Kimberly

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), the undersigned counsel for *amici curiae* certifies that this brief:

(i) complies with the type-volume limitation of Rule 32(a)(7)(B) because it contains 5,364 words, including footnotes and excluding the parts of the brief exempted by Rule 32(f); and

(ii) complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared using Microsoft Office Word 2016 and is set in New Century Schoolbook font in a size equivalent to 14 points or larger.

November 6, 2019 */s/ Michael B. Kimberly*

CERTIFICATE OF SERVICE

I hereby certify that that on November 6, 2019, I electronically filed the foregoing brief with the Clerk of the Court using the appellate CM/ECF system. I further certify that all participants in this case are registered CM/ECF users and that service will be accomplished via CM/ECF.

November 6, 2019 */s/ Michael B. Kimberly*

No. 19-35415

In the

United States Court of Appeals

for the

Ninth Circuit

LIGHTHOUSE RESOURCES INC., et al.,
Plaintiffs-Appellants,

BNSF RAILWAY COMPANY,
Intervenor-Plaintiff-Appellant,

– v. –

JAY ROBERT INSLEE, in his official capacity as Governor of the State of Washington, et al.,
Defendants-Appellees,

WASHINGTON ENVIRONMENTAL COUNCIL, et al.,
Intervenor-Defendants-Appellees.

On appeal from the United States District Court for the Western District of Washington, Case No. 3:18-cv-05005, Hon. Robert J. Bryan

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MOTION OF AMERICAN FUEL & PETROCHEMICAL MANUFACTURERS, ASSOCIATION OF AMERICAN RAILROADS, CROW NATION, NATIONAL ASSOCIATION OF MANUFACTURERS, NATIONAL MINING ASSOCIATION, AND NATIONAL TRIBAL ENERGY ASSOCIATION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* SUPPORTING PLAINTIFFS-APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

No *amicus* signing this brief has a parent corporation, and no publicly held corporation owns 10% or more of any of *amici*'s stock.

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* SUPPORTING PLAINTIFFS-APPELLANTS

Pursuant to Fed. R. App. P. 29(a)(3), the American Fuel & Petrochemical Manufacturers, Association of American Railroads, Crow Nation, National Association of Manufacturers, National Mining Association, and National Tribal Energy Association respectfully move for leave to file the attached brief as *amici curiae* supporting appellants. In support of this motion, proposed *amici* state as follows:

1. The American Fuel & Petrochemical Manufacturers (AFPM) is a national trade association whose members comprise virtually all refining and petrochemical manufacturing capacity in the United States. AFPM's members supply consumers domestically and internationally with a wide variety of products that are used daily in homes and business. Among its other missions, AFPM engages in legal advocacy on issues important to its members.

The Association of American Railroads (AAR) is an incorporated, nonprofit trade association comprised of freight and passenger railroads. AAR's freight members operate 83 percent of the line haul mileage, employ 95 percent of the workers, and account for 97 percent of the freight revenues of all railroads in the United States. Its passenger rail members operate intercity passenger trains and provide commuter rail services. Together,

AAR's member railroads operate a rail system that spans North America and links to a globalized goods movement network.

The Crow, or Apsaalooke, Nation is a federally-recognized tribe in Montana with an enrolled membership of 14,000. With a 75% unemployment rate, the Crow Nation must generate revenue to provide jobs and services for tribal members. The Crow Nation has an abundance of natural resources ready to be developed, including 18 billion tons of exportable coal, which represents ten percent of the United States' coal reserves, and three percent of the world's. The Crow Nation has a significant interest in developing and exporting its coal resources.

The National Association of Manufacturers (NAM) is the largest manufacturing association in the nation, representing small and large manufacturers in every industrial sector in all 50 states. U.S. manufacturers employ more than 12 million men and women, contributes $2.25 trillion to the U.S. economy annually, have the largest economic impact of any sector of the American economy, and account for more than three-quarters of nationwide private-sector research and development. The NAM is the voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

The National Mining Association is a national trade association whose members produce most of America's coal, metals, and industrial and agricultural minerals. Its membership also includes manufacturers of mining and mineral processing machinery and supplies, transporters, financial and engineering firms, and other businesses involved in the nation's mining industries.

The National Tribal Energy Association is a national tribal organization that represents the top energy producing tribes. Together, these tribes represent over 300,000 individual members who rely directly on the continued production of energy, as well as the uninterrupted flow of energy products to their customers. The Association's principal mission is assisting and advocating for the development and exportation of tribal energy resources. The Indian Commerce Clause (U.S. Const. art. I, sec. 8, cl. 3) provides strong constitutional support for the unimpeded exportation of tribal energy resources.

Proposed *amici*—each of which is directly impacted by national policies regarding the mining, transportation, or use of coal—have a substantial interest in the proper resolution of this appeal. Defendants seek to block construction of the Millennium Bulk Terminal, because of their policy disagreement regarding the worldwide use of coal. In this way, defendants—State officials—seek to countermand foreign trade initiatives. Tolerance of

such obstruction would hurt American workers, inhibit American economic growth, and violate the Constitution's command that the federal government serve as the sole representative of the United States in foreign trade and foreign affairs.

2. Proposed *amici* respectfully submit that an *amicus* brief addressing the underlying Foreign Commerce Clause issue in this case will be helpful to the Court as it considers this appeal. The Court will be better able to assess the practical consequences of affirming the district court's order if it has a fuller understanding the underlying constitutional issue at stake. The constitutional issues are not directly addressed by the parties' briefs. Proposed *amici*'s brief addresses the merits of this issue succinctly and will thus give the Court helpful background without burdening the Court as it considers the issues raised on appeal.

3. Pursuant to Circuit Rule 29-3, proposed *amici* sought the consent of the parties to file their brief. Appellants have consented to the filing of the brief. Intervenor-Defendants-Appellees took no position on the filing of the brief. And by email dated November 5, 2019, counsel for Defendants-Appellees stated that they "will make a decision on whether to object to the filing after we have an opportunity to review [the brief]."

CONCLUSION

Proposed *amici*'s motion for leave to file an *amicus* brief in this case should be granted, and the attached brief should be deemed filed.

November 6, 2019

Respectfully submitted,

/s/ Michael B. Kimberly

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), the undersigned counsel for *amici curiae* certifies that this motion:

(i) complies with the type-volume limitation of Rule 27(d)(2)(A) because it contains 829 words, including footnotes and excluding the parts of the motion exempted by Rule 32(f); and

(ii) complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared using Microsoft Office Word 2016 and is set in New Century Schoolbook font in a size equivalent to 14 points or larger.

November 6, 2019 /s/ *Michael B. Kimberly*

CERTIFICATE OF SERVICE

I hereby certify that that on November 6, 2019, I electronically filed the foregoing motion with the Clerk of the Court using the appellate CM/ECF system. I further certify that all participants in this case are registered CM/ECF users and that service will be accomplished via CM/ECF.

November 6, 2019 /s/ *Michael B. Kimberly*

BULK TERMINALS
millennium
LONGVIEW, LLC

September 12, 2018

The Honorable John Barrasso
Chairman, Senate Environment & Public Works Committee
307 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Tom Carper
Ranking Member, Senate Environment & Public Works Committee
513 Hart Senate Office Building
Washington, DC 20510

Dear Chairman Barrasso and Ranking Member Carper:

On behalf of Millennium Bulk Terminals-Longview LLC, (Millennium) please accept this letter in support of the *Water Quality Certification Improvement Act of 2018*. As you know, Millennium proposes to build a coal export terminal on the lower Columbia River. Based on our experience in being the only project proponent to have received a water quality certification denial "with prejudice" in Washington State, and the only project to have been denied a water quality certification on the basis of non-water quality factors, we share your belief that the Clean Water Act (CWA) is to be used to protect water quality, and should not be misused to block projects that might be unpopular to some. Congress never intended that the limited authority provided to *states* under CWA section 401 to weigh in on the propriety of a proposed *federal* permit would be used by states to veto projects based on political concerns having nothing to do with water quality.

To the contrary, as you well know, section 401 was promulgated to enable states to ensure that federally permitted projects would not result in water quality standards violations in state waters. Recent developments in Washington State demonstrate that the CWA, as presently worded, is susceptible to abuse by state actors who have little regard for the *cooperative* federalism imbedded in the statute, and who wish, instead, to dictate whether a federal permit should be issued (or not) by manipulating the section 401 certification process for their political purposes.

In addition to providing support for the proposed legislation, this letter responds to the comments of Washington State Department of Ecology (Ecology) Director Maia Bellon. Director Bellon's letter to Chairman Barrasso dated August 15, 2018, addressed both the Committee's proposed legislation and her decision to deny Millennium a section 401 certification "with prejudice." Director Bellon insists that she denied Millennium's section 401 certification because her agency found that Millennium "failed to

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meet existing water quality standards;" and because Millennium failed to propose any mitigation to offset adverse environmental impacts. As we demonstrate below, these statements are patently false.

First, her lawyers insisted-- -- based on sworn statements from Ecology staff-- that the agency's denial "with prejudice" was *not* based on CWA factors, but was instead based entirely on authority under the Washington State Environmental Policy Act (SEPA). Unless her lawyers and staff provided false testimony to the administrative tribunal, Director Bellon's letter to Congress is at best mistaken, or otherwise simply false.

Second, contrary to Director Bellon's letter, Millennium has both proposed and submitted to Ecology a host of mitigation plans for environmental impacts. We are providing the following information to clear up any discrepancy in the record Director Bellon's letter created concerning Millennium, and to highlight for the Committee the grossly unfair treatment we received from the Department of Ecology at the direction of Director Bellon, and thus, the need for your proposed legislation.

At Millennium, we are committed to protecting the water resources of the state and federal government and we take that responsibility seriously. We were heartened that the Final Environmental Impact Statement published by the state of Washington and Cowlitz County (SEPA FEIS) concluded that our project would not result in significant adverse impacts to water quality, wetlands, aquatic biota, or fish. Notwithstanding these favorable water quality conclusions in the SEPA FEIS, Ecology Director Bellon denied the water quality certification based largely on indirect impacts from trains and vessels, and specifically, impacts that included air emissions from locomotives, impacts on vehicular traffic, rail capacity concerns and train -caused noise and vibrations, among other non-water quality factors.

Millennium Coal Export Terminal

Millennium is proposing to locate a coal export terminal on a 190-acre brownfield site on the Columbia River near Longview, Washington. At full build-out, the project would be capable of shipping up to 44 million metric ton per year to markets in Asia. The site was selected after a review of more than 20 sites on the west coast of the US, Canada and Mexico for its existing infrastructure. The project would reuse a portion of an industrial site originally developed for the aluminum industry during World War II, coexisting with an operating bulk product terminal. Coal from the Powder River or Uinta Basins would be transported by unit trains to the site over existing rail lines. Two new docks would be constructed on the Columbia River, providing access to Panamax-sized vessels that can reach the site via the existing US Army Corps of Engineers dredged shipping channel.

The project site is located in Cowlitz County, Washington, a county with unemployment rates that far exceed other Washington counties. Cowlitz County residents have expressed a strong support for the family-wage construction and operation jobs that would come with the project, and would provide opportunities for workers to stay close to home rather than having to commute long distances to find work.

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Millennium's objective is to transform the former Reynolds smelter site into a new, economically vibrant and environmentally responsible world-class port facility. To accomplish this, we are actively and voluntarily working with state and local agencies in our cleanup efforts. Millennium, Northwest Alloys (Alcoa) and Ecology have entered a voluntary agreement to ensure the cleanup of the site follows all state rules and regulations. Evidence of localized contaminants from Reynolds' operations has been measured, and although the site has been classified by Ecology as low-risk, we are closely and carefully coordinating an extensive cleanup process. Cleanup costs are carried by the private entities and not the public. Reports on the progress of our efforts are regularly submitted to local and state agencies. By conducting a thorough investigation and developing cleanup plans in compliance with applicable laws and regulations, we are a step closer to our goal of building a world-class port facility in an environmentally responsible way.

Permitting History

Millennium applied for local (Cowlitz County), state, and federal permits for the project in February 2012, over six years ago. In order to provide full disclosure of all of the potential impacts of the project, we have provided the agencies with over 15 million dollars to pay for a third party consultant to write separate state (SEPA) and federal (NEPA) EISs. The 13,600 page SEPA EIS was completed in April 2017. The NEPA Draft EIS was published in September 2016.

Ecology's Denial of Millennium's CWA Section 401 Water Quality Certification

Director Bellon's letter attempts to defend her agency's actions in denying the project a Section 401 Water Quality Certification. According to Director Bellon: *"The facts of this denial ore simple: Millennium failed to meet existing water quality standards and further failed to provide any mitigation plan...."*

This statement is in direct contradiction to her department's reply brief to the Washington Pollution Control Hearing Board (PCHB) insisting that Ecology did not deny the certification "with prejudice" based on the deficiencies set forth in Section III (water quality) of the denial Order. That part of the Denial Order dealt with information that Ecology alleged was both missing and necessary for it to *first make* a determination as to whether it had "reasonable assurance" that the project would not violate water quality standards. In other words, Section III of the Order stated that Ecology simply could not determine based on the information it had, *whether or not* project discharges would comply with water quality standards.

Accordingly, the case she lays out in her letter to you is flatly contradicted by the plain language of the Denial Order itself. At best, it is inconsistent with both Ecology testimony during the appeal of the permit denial and the findings of the Washington PCHB (Decision at paragraph 19 concluding that the Denial "with prejudice" was based solely on SEPA), and at worst, is plainly disingenuous.

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Instead of properly relying on the CWA, Ecology insisted that Director Bellon *"decided to exercise Ecology's SEPA substantive authority on the first permit decision before her —the 401 certification-- and deny the certification with prejudice."* Ecology explained that *"the reason Ecology issued the denial "with prejudice" is that the significant, adverse, impacts identified in the EIS cannot reasonably be mitigated. Since they cannot be mitigated, there is no way for Millennium to address them and consequently no basis on which to continue keeping the section 401 process apen."* In short, the record demonstrates that the denial "with prejudice" was based on anything other than water quality concerns, and in no way stemmed from any agency findings or conclusions that Millennium's proposed project would not be able to comply with water quality standards.

SEPA Findings and Proposed Mitigation

Similarly, Director Bellon's claims as to the impacts and risks that the project would pose are both contrary to testimony of her own lawyers and staff, and to the findings of the SEPA EIS. Her agency undeniably concluded in the Final EIS that Millennium's proposed coal export project will not have a significant adverse effect on water quality. Millennium is now appealing Ecology's certification denial, and the PCHB's decision upholding that denial, because both Ecology and the PCHB have inaccurately applied the CWA to our project. We are confident the law is on our side.

In her letter to you, and in other public statements, Director Bellon makes claims that are not supported by the SEPA EIS her own agency produced. Director Bellon wholly ignores the mitigation that Millennium has proposed to more than offset wetland and habitat losses. Among her claims, and the rebutting facts found in Ecology's EIS, are the following:

Bellon Claim:

> **The project would destroy 24 acres of wetlands on the site.**
>
> **FACT**: As stated in Section 4.3 of the SEPA FEIS, 24 acres of existing wetlands would be filled. Millennium submitted a Conceptual Mitigation Plan in May 2017 to the U.S. Army Corps of Engineers (Corps), Cowlitz County and Ecology. The Mitigation Plan identifies a nearby downriver site that is currently a ditched and drained agricultural pasture. The Plan would convert the pasture into 61 acres of wetlands, rehabilitate approximately 14 acres of degraded wetlands, and revegetate approximately 14 acres of upland buffer, providing a total of 88 acres of mitigation. This mitigation proposal provides more than what is required for wetland mitigation and is intended to insure against any unforeseen shortfalls in wetland creation. Neither the Corps nor the County has found the Plan to be inadequate. To the contrary, the County reviewed the plan, determined it to be adequate and issued a permit for that activity in July 2017.

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Section 4.3 of the SEPA FEIS concludes: *"Compliance with laws and implementation of the mitigation measures described above would reduce and compensate for impacts on wetlands. There would therefore be no unavoidable and significant adverse environmental impacts on wetlands."*

Most of the wetlands that will be impacted by the proposal (over 21 acres) are considered Category III wetlands, and only three acres are considered Category IV wetlands. Washington State ascribes this rating system to wetlands based on their functions. Washington State Wetland Rating System for Western Washington (Hruby 2006). Category I wetlands have the highest level of function, are afforded the widest buffers, and impacts on such wetlands require the largest amount of compensatory mitigation. Category IV wetlands, on the other hand, have the lowest level of function, are afforded more narrow buffers, and impacts on such wetlands require a lower amount of compensatory mitigation.

Millennium's proposed wetland mitigation plan would convert an existing ditched and drained agricultural pasture to a diverse habitat of emergent, forested and scrub-shrub wetlands within the historic, and now disconnected, floodplain of the Columbia River. The proposed mitigation would restore hydrology and historic forested and scrub-shrub wetlands, and provide potential habitat for wildlife such as Columbia white-tailed deer. In total, the mitigation would convert over approximately 61 acres of upland pasture to palustrine forested, scrub-shrub, and/or emergent wetlands, rehabilitate approximately 14 acres of degraded emergent wetlands and revegetate approximately 14 acres of upland buffer.

Bellon Claim:

Dredging 41 acres of river bed would damage Washington's water quality.

FACT: The dredging would be required to provide ships access from the US Army Corps maintained Columbia River shipping channel to the proposed new docks. As required by the Corps and other agencies, a sediment characterization report has been prepared. On August 25, 2017, Jennifer Sutter, Project Manager for Oregon's Department of Environmental Quality (DEQ), found that the dredge material would meet Class A criteria because the dredged spoils contain constituents at a level below detection levels for chemicals, metals and pesticides of concern to water quality. Dredge material that meets Class A criteria by definition does not impair water quality.

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Bellon Claim:

Driving 537 pilings into the river bed for over 2,000 feet of new docks would result in the loss of five acres of aquatic habitat.

FACT: Millennium has proposed to construct an aquatic habitat mitigation site by converting an existing, isolated pond to an off-channel aquatic habitat connected to the Columbia River. Our Conceptual Mitigation Plan for Wetlands and Aquatic Habitat was submitted to Ecology, Cowlitz County and the Corps in May of 2017. Cowlitz County has approved the plan and issued a Critical Areas Permit for the project in July 2017. Millennium proposes to construct the Off-Channel Slough Mitigation Site, which will provide seasonally-inundated off-channel habitat with associated emergent and riparian vegetation, by improving an existing pond and connecting it to the river. This habitat type was historically widespread but has since been vastly reduced throughout the lower Columbia River system. The pond is located along the shore, riverward of the levee, in the upstream portion of the Millennium lease area adjacent to the bulk terminal. As described below, approximately 12 acres of new habitat would be created to more than offset the loss of the five acres.

This compensatory mitigation will provide new off-channel aquatic habitat, which is highly valuable to juvenile salmonids of the lower Columbia River and has been disproportionately lost through development and management of the Columbia River. The proposed Site will achieve the following environmental goals:

- Provide off-channel aquatic habitat that is connected to the Columbia River.
- Ensure access to the off-channel habitat for juvenile salmonids.
- Provide structurally diverse native vegetation communities within the off-channel habitat.
- Provide structurally diverse native riparian vegetation on the outer berm.

Functional objectives detail how the goals of the mitigation action will be implemented. The functional objectives for the Aquatic Mitigation Action are as follows:

- Provide 7.0 acres of new off-channel aquatic habitat below OHW that incorporates emergent, shrub, and forested components.
- Provide an effective connection between the Columbia River and the off-channel habitat.
- Establish 4.5 acres of native emergent, shrub, and tree species within the off-channel habitat.
- Establish 0.75 acre of native riparian vegetation on the outer berm.

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Bellon Claim:

The application provided insufficient information on how contaminated wastewater and stormwater would be managed at the site during both construction and operations. The application did not provide sufficient information to demonstrate that wastewater and stormwater discharges would meet state water quality standards, including an inadequate description of the types and amounts of contaminants in the discharge, and an incomplete analysis of how the treated discharge would potentially impact the ambient water quality of the Columbia River. The application did not provide sufficient information on how contaminated wastewater and stormwater would be adequately controlled to minimize the discharge of pollution to the Columbia River.

FACT: Section 4.5 of the SEPA FEIS describes the best management practices proposed by MBT-Longview and the robust measures available and proposed for managing wastewater and stormwater during both construction and operations. The SEPA FEIS acknowledges that impacts could occur but that the level of impacts would be below benchmarks or applicable standards designed to protect water quality. The SEPA FEIS made repeated findings that the project would not result in significant adverse effects to water quality, wetlands, fish, and the aquatic environment more generally and anticipated that technology was available and would be implemented to ensure that any impacts would be mitigated in accordance with applicable water quality standards. Section 4.5 of the SEPA FEIS concludes: *"Compliance with laws and implementation of the measures and design features described above would reduce impacts on water quality. There would be no unavoidable and significant adverse environmental impacts on water quality."*

Millennium submitted detailed information to Ecology to demonstrate its ability to meet water quality standards sufficient for a section 401 certification, but Ecology decided not to work with Millennium to complete the certification process. Ecology and Director Bellon decided instead to abruptly terminate the process and deny the certification "with prejudice" to veto the project altogether, and in so doing, relied on non-water factors found in that same EIS.

Bellon Claim:

The company would need access to sufficient water supplies to manage coal dust and to suppress fires during normal operations at the site. The company could not demonstrate they had sufficient rights to use water wells on the site for these purposes.

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FACT: As stated on page 4.4-23 of the SEPA FEIS: *"Approximately 1,200 gpm during the wet season and 2,000 gpm during the dry season (approximately 2,034 AFY) would normally be required for dust suppression. On-site groundwater wells would provide approximately 635 gpm (1,025 AFY) to maintain minimum water levels in the storage pond to meet process water demands during the dry season. Water from the storage pond could also be used for the fire hydrant, sprinklers and deluge systems, watering of landscaping and other non-recyclable uses. Northwest Alloys holds water rights that originally authorized extraction of 23,150 gpm up to a total volume of 31,367 AFY." "The total demand accounts for less than 10% of the maximum pumping limit allowed under original water rights. Therefore, operation of the Proposed Action would have a negligible impact on groundwater supply. The Applicant would ensure that water rights are current before withdrawing any water for construction or operations; water rights would be maintained for ongoing groundwater use during operation of the Proposed Action."*

The Columbia River is not a closed basin, and new water rights can be obtained if needed.

Bellon Claim:

Because the site is a toxic cleanup site from past smelter operations, it has preexisting groundwater and soil contamination. The application needed to show how construction would affect this contamination and future cleanup work, and ensure that the discharge would continue to meet water quality standards. The application did not provide sufficient information to show that construction activities would be conducted in a way that would ensure that the existing contamination at the site would be properly contained and managed.

FACT: There has been an extensive (over 12 year) process to develop both a renewed NPDES permit for the site and a Remedial Investigation/Feasibility Study (RI/FS) on voluntary site cleanup. The cleanup site is ranked by Ecology as a 5 (on a 1 to 5 scale), which is the lowest risk ranking for both human health and the environment. As noted on page 4.4-18 of the SEPA FEIS, *"Construction of the Proposed Action could encounter previously contaminoted areas currently identified in the MTCA Cleanup Action Plan, which could degrade groundwater quality. However, with the exception of twa small areas—the eastern corner of the Flat Storage Area and the northeastern portion of Fill Deposit B-3 (Figure 4.4-5 in the FEIS)—cleanup actions are not recommended in the draft Cleanup Action Plon within the project area. For the Flat Storoge Area and Fill Deposit B-3, construction and remediation activities would be coordinated to prevent spread of contamination or environmental impacts."*

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Waiver

As you know, under current law, the State was required to issue a final certification decision within one year of receipt of Millennium's application for a CWA Section 401 certification. 33 U.S.C. § 1341(a)(1)("if the state. . . fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements. . . shall be waived with respect to such Federal application."). To accommodate agency processes, Millennium applied for a CWA Section 401 certification three times over the last six years of permit processing. Millennium first applied for a CWA Section 401 certification on February 22, 2012 as part of its Corps permit application. At the Corps' request, Millennium withdrew the application to allow time for the completion of the EISs. On July 13, 2016, as the SEPA EIS neared completion, Millennium again submitted an application for a CWA Section 401 certification. To allow for additional time for Ecology to consider Millennium-provided reports and materials, and at Ecology's request, Millennium withdrew this application once again on June 21, 2017 and reapplied for the third time on June 27, 2017. Therefore the State was required to issue a final decision on that application by June 27, 2018.

Although Ecology issued an initial decision on September 26, 2017 denying Millennium's certification, the record demonstrates that the State has waived its right to issue a CWA section 401 certification in two separate and independent ways. First, more than one year passed between Ecology's receipt of the application and the PCHB's issuance of the final 401 certification decision. During the ensuing appeal of Ecology's certification denial, Ecology told the Superior Court in Cowlitz County that its Denial Order was not final until the PCHB reviewed and decided Millennium's administrative appeal. The PCHB's decision was made more than one month after the expiration of the one year statute of limitations period set forth under CWA section 401.

Second, even if this final decision was timely (and it was not), the certification decision made by Ecology and affirmed by the Board, is not the certification required by 33 U.S.C. §1341(a)(1). Pursuant to CWA section 401, the State was required to determine whether a facility's discharge will violate "the applicable provisions of sections 1311, 1312, 1313, 1316 and 1317" of the CWA. 33 U.S.C. § 1341(a)(1). The State did not make this determination. Instead the State decided to answer a different question: whether Ecology should deny the project based on SEPA, R.C.W. §43.21C.060. But Congress did not authorize states to certify whether a proposed project should be denied under SEPA either in CWA section 401 or anywhere else in the CWA.

Conclusion

Millennium is committed to operating in a responsible manner. We value our natural environment and the safety of our employees. Our employees have lived in and around Cowlitz County for generations. They understand the unique opportunities offered by the Columbia River and the responsibility that comes with protecting the air, water and land that surround it.

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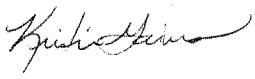
In closing, we can have clean water and a healthy environment while safely utilizing the vast natural resources provided by the Columbia River. We thank you for your efforts to clarify the original intent of the CWA, and section 401 in particular, and trust that this letter will both set the record straight as it concerns Millennium's project, and provide support for the badly needed clarifying amendment your committee is debating.

Sincerely,



Kristin Gaines
Sr. Vice President of Regulatory Affairs
Millennium Bulk Terminals-Longview

CC: Patty Murray, Senator
Maria Cantwell, Senator
Jaime Herrera Beutler, Representative
Senate Environment & Public Works Committee Members

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Senator BARRASSO. Senator Gillibrand.

Senator GILLIBRAND. Thank you, Mr. Chairman, and Mr. Ranking Member.

We hear a lot about States' rights, particularly from the current Administration. We are told that we should be leaving environmental regulations to the States, that they are in the best position to determine how to protect their environment and natural resources.

We are also told that States—not the Federal Government—should have the primary jurisdiction over regulating the majority of our water bodies, and that the Clean Water Act should be restricted to just traditionally navigable waters.

But not surprisingly, when States use the authority legally delegated to them under the Clean Water Act to protect water quality, we hear from those same people that those States have somehow abused their power and must be reined in. That is absurd, and it undermines the foundation principle of cooperative federalism enshrined in the Clean Water Act.

It seems that some policymakers are willing to throw the baby out with the bathwater and restrict the rights of all States under the Clean Water Act, simply because they disagree with the lawful decision of some States—including my own—to deny a very small number of permits.

The Trump administration and Administrator Wheeler have explicitly said that they are proposing changes to the Section 401 process because of New York's gas blockade. The Administration has cited three high profile denials by the State of water quality permits for interstate natural gas pipelines as an example of unnecessary delays.

However, in each of those instances, the State's denial was based on relevant water quality standards and subject to judicial review. Additionally, New York State annually receives more than 4,000 applications for Section 401 water quality certifications, and on average, denies approximately 8. That means the State is approving more than 99 percent of the applications it receives every year on time. Hardly the picture of obstruction or an out of control State regulator.

So what then is this really about? It is about removing a procedural block to establishing a more industry friendly regulatory process that gets meddlesome State regulators out of the way so that special interests can build what they want, where they want, even if it means harming water quality and running roughshod over principles of federalism they claim to support. This is bad policy, it is short sighted, and could have very damaging impacts in our States.

With that, Ms. Watson, I have a couple questions for you. Under the Section 401 process, States can apply conditions on Federal permits and licenses to ensure that projects meet applicable State water quality requirements. However, the Trump administration's proposed rule would restrict the types of conditions that States can set and give Federal permitting agencies the authority to veto them.

Could you describe the types of conditions that States might impose on a project that would not otherwise be included on a Federal

permit? What impact will this have on wetlands, streams, and other water bodies impacted by the construction or operation of a project?

Ms. WATSON. So there are a lot of examples of conditions that States might include in 401 certifications to protect water quality that wouldn't otherwise be covered by the Federal permit example. So that would be protection of groundwater, sedimentation standards, erosion standards, best management practices for stormwater, protections for endangered species. These are things that get added through the 401 certification process that have routinely been included in Federal permits for the last 50 years without a problem.

These are State based water quality requirements, and what is being proposed through the bill and through EPA's rule would upend that 50 year State control of water pollution in their States.

Senator GILLIBRAND. What are the practical implications of reducing the amount of time that States have to make Section 401 decisions? Will this result in more project approvals or improve water quality protection?

Ms. WATSON. It will not result in more water quality approvals. It will actually have the unintended consequence of resulting in more denials because States will not have sufficient time to make decisions.

But on top of that, EPA is limiting the amount of information that States can consider. So States won't have the tools and the information necessary to be able to, in fact, protect water quality within their States.

Senator GILLIBRAND. Thank you.

I just wanted to respond to something our other witnesses said. Governor Gordon, I recognize that you want to be able to have the best economy for Wyoming. But the truth is, if you try to remove New York's regulatory authority, you will affect our economy, because our economy is based on clean air and clean water. We have agriculture all across New York that relies on clean air and clean water. We have a tourism industry that is very valuable.

We have New York City, which is 8 million people, that gets clean water from a watershed, unfiltered water. If we had to filter that water, it would cost us tens of billions of dollars.

So I just want to be clear. We know how to protect our State and our economy, and I would just suggest that you would give deference to our Governor in the way that our Governor would give deference to you in understanding what is best for your economy.

And then Governor Stitt, I just was offended by your statements that you know how to have good water in Oklahoma. I would just like unanimous consent to submit four articles for the record of how challenged your water quality actually is in Oklahoma, which I am sure you are aware. I am grateful that you have made progress in eliminating some contaminants, and that is a good thing, but it may be because you are starting from a worse off place.

Thank you, Mr. Chairman.

Senator BARRASSO. Thank you, Senator Gillibrand.

[The referenced information follows:]

Oklahoma

EWG's drinking water quality report for Oklahoma shows results of tests conducted by the water utilities in Oklahoma and provided to EWG by the Oklahoma Department of Environmental Quality.

LARGE UTILITIES | ALL UTILITIES WITH VIOLATIONS | LARGE UTILITIES WITH VIOLATIONS

Utilities that accumulated/accrued the most violation points as of April 2016 to March 2019 in Oklahoma

The Environmental Protection Agency's Enforcement and Compliance History Online (**ECHO**) database collects compliance and enforcement-related information for drinking water utilities nationwide. ECHO water quality violation scores take into account federal health-based water quality standards, as well as monitoring, reporting and other drinking water quality requirements. **Points are accrued** based on specific problems at the utility - violations of health-based drinking water standards receive more points than monitoring and reporting violations - and the length of time until the violations were corrected.

Utility	Location	People Served	Violation Points
Hugo Municipal Authority	Hugo, OK	5,536	374
Barnsdall	Barnsdall, OK	1,243	318

Utility	Location	People Served	Violation Points
Pittsburg County Rural Water District #14	Mcalester, OK	1,680	302
Beggs	Beggs, OK	1,364	293
Otoe-missouria Tribe	Red Rock, OK	250	273
Nowata Municipal Authority	Nowata, OK	3,971	239
Loyal	Loyal, OK	81	193
Canadian County Rural Water District # 1	Calumet, OK	750	193
Okarche	Okarche, OK	1,110	192
Southern Okla Water Corp	Ardmore, OK	11,250	183
Stroud Utilities Authority	Stroud, OK	2,811	165
Sardis Lake Water Authority	Clayton, OK	307	164
Hollis	Hollis, OK	2,264	162
Pittsburg	Pittsburg, OK	280	159
Walnut Park Estates	Prue, OK	42	150
Okmulgee	Okmulgee, OK	13,495	146

Utility	Location	People Served	Violation Points
Hominy	Hominy, OK	2,584	142
Deer Creek	Deer Creek, OK	147	138
Pecan Tree Estates Addn	Noble, OK	22	137
Morris	Morris, OK	1,440	132
Muskogee County Rural Water District #3	Council Hill, OK	900	129
Tipton	Tipton, OK	916	124
Mcintosh County Rural Water, Sewer & Solid Waste Management District #2 (onapa)	Checotah, OK	2,774	119
Wanette Public Works Authority	Wanette, OK	402	115
Ryan Utilities Authority	Ryan, OK	800	115
Hartshorne	Hartshorne, OK	2,300	114
Cherokee County Rural Water District #1 (Ft. Gibson)	Fort Gibson, OK	710	112
Asher Utility Dev Authority	Asher, OK	375	104
Tullahassee Water	Tullahassee, OK	106	102
Elm Bend Rural Water District Inc.	Ochelata, OK	600	102

Contaminants found in Oklahoma above health guidelines

Contaminant	Found above health guidelines		Found	
	# of Utilities	People Served	# of Utilities	People Served
Total trihalomethanes (TTHMs)	807	3,529,735	807	3,529,735
Dibromochloromethane	775	3,486,376	783	3,497,493
Bromodichloromethane	753	3,483,510	753	3,483,510
Chloroform	652	3,332,152	692	3,421,090
Nitrate and nitrite	693	3,132,784	778	3,367,026
Dichloroacetic acid	578	3,101,747	621	3,318,413
Trichloroacetic acid	500	2,789,984	530	2,911,673
Chromium (hexavalent)	177	1,832,146	213	2,633,394
Bromoform	449	1,820,803	592	2,933,093
Radium, combined (-226 & -228)	550	1,688,396	552	1,697,390

Contaminants found in Oklahoma above legal limits

Contaminant	# of Utilities	People Served
Total trihalomethanes (TTHMs)	118	261,198
Haloacetic acids (HAA5)	22	27,518
Nitrate and nitrite	14	8,992
Uranium	5	7,973
Radium, combined (-226 & -228)	3	3,750
Arsenic	5	3,179
Nitrate	5	3,167
Carbon tetrachloride	1	845
Cadmium	1	225

The New York Times

Here Are the Places That Struggle to Meet the Rules on Safe Drinking Water

By Brad Plumer and Nadja Popovich

Feb. 12, 2018

WASHINGTON — To ensure that tap water in the United States is safe to drink, the federal government has been steadily tightening the health standards for the nation's water supplies for decades. But over and over again, local water systems around the country have failed to meet these requirements.

In a new study published in the Proceedings of the National Academy of Sciences, researchers found that, since 1982, between 3 and 10 percent of the country's water systems have been in violation of federal Safe Drinking Water Act health standards each year. In 2015 alone, as many as 21 million Americans may have been exposed to unsafe drinking water.

The problem is particularly severe in low-income rural areas, the study found. And the researchers identified several places, including Oklahoma and West Texas, that have repeatedly fallen short in complying with water safety rules issued by the Environmental Protection Agency over the past decade.

"These are often smaller communities flying under the radar," said Maura Allaire, an assistant professor of urban planning at the University of California, Irvine, and a lead author of the study. "They're struggling to maintain their aging infrastructure, and they're struggling to keep up with the latest water treatment techniques."

Concerns about the safety of America's tap water gained national prominence after the 2015 crisis in Flint, Mich., when residents discovered dangerously high levels of lead in their drinking water. Since then, a barrage of reports have revealed that a surprisingly large number of local water systems serving millions of Americans sometimes contain unsafe levels of contaminants like lead, nitrates, arsenic or pathogens that can cause gastrointestinal diseases.

In many cases, it can be unclear whether such contamination is isolated or evidence of a deeper systemic problem at a water utility.

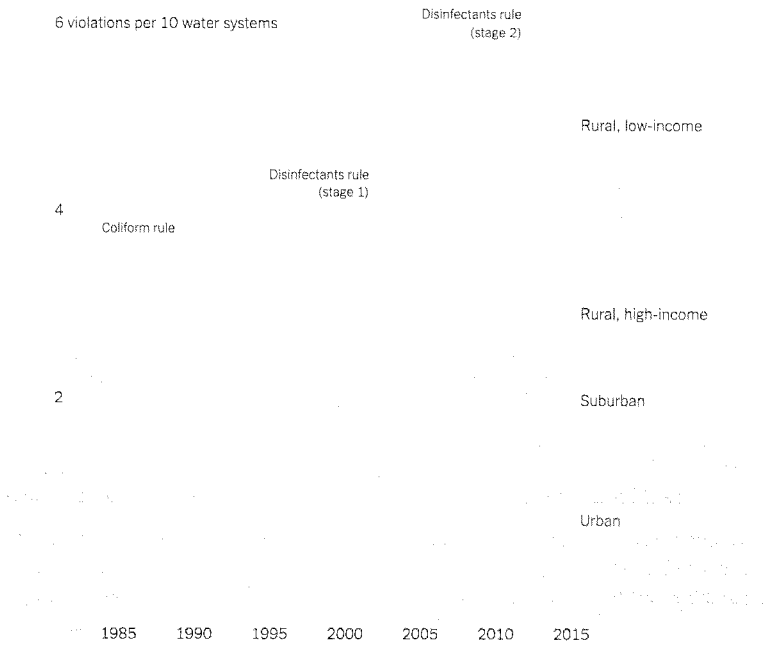
To address that issue in this newest study, Dr. Allaire and co-authors from Columbia University's Water Center looked for patterns in health-based violations over time at 17,900 local water systems around the United States between 1982 and 2015. She said one question guiding the research was "What kind of factors make some water utilities more susceptible than others?"

One striking finding: Health violations for drinking water surged in rural areas in the 2000s after the E.P.A. enacted regulations focused on disinfectants. Utilities have long used chlorine or other chemicals to disinfect their drinking water supplies. But this process has a troubling side effect. Those chemicals can react with organic matter in the water to create new compounds that may pose their own health risks.

In recent years, the E.P.A. has required water utilities to limit these disinfectant byproducts, though doing so can be costly and technically challenging. That often poses difficulties for rural water utilities with smaller customer bases and fewer financial resources.

Rural Areas Have More Violations

Low-income, rural communities have especially struggled to comply with new water quality regulations.



Notes: The first stage of the disinfectants rule went into effect in 2002 for water systems that serve more than 10,000 customers, and in 2004 for smaller systems. Implementation of the second stage was staggered between 2012 and 2013. • Source: Allaire, Wu, and Lall, PNAS • By The New York Times

"Many of these smaller utilities have just a handful of people who are charged with managing the entire system," said Manuel P. Teodoro, a political scientist at Texas A&M University who has studied the challenges facing small and rural water utilities.

He noted that this research suggests one possible strategy for improving water quality in rural areas: States might provide aid to help smaller water utilities merge and consolidate into larger systems that are better able to comply with complex safety rules. California has been exploring such an approach.

Dr. Allaire and her co-authors also found that water systems that serve minority and low-income communities were more likely to violate federal standards around coliform bacteria, which frequently accompany disease-causing pathogens. Their research also showed that

privately owned utilities had fewer violations than publicly owned utilities, and that larger water systems tended to have fewer violations than smaller systems.

The whole point of tracing these patterns, Dr. Allaire said, was to help policymakers understand which parts of the United States might require additional scrutiny or assistance in meeting national water quality standards. "Otherwise," she said, "we have no systematic way to identify problems and set priorities."

This new study may understate the full extent of problems with the nation's drinking water systems, said Kristi Pullen Fedinick, a scientist with the Natural Resources Defense Council, an environmental group that conducted its own nationwide survey of Safe Drinking Water Act violations last year.

State governments are largely responsible for implementing federal water-quality standards, and the quality of monitoring and enforcement can vary significantly. Some states have cut back on budgets for their drinking water programs, and many communities focus on tracking just a handful of key contaminants like coliform or disinfectant byproducts. That means potential violations involving other contaminants, like lead, may go underreported.

"On a national scale, we know that there's a huge amount of underreporting," Dr. Fedinick said.

In recent years, the E.P.A. and Justice Department have often been reluctant to penalize states or municipalities that fall behind on enforcement or reporting. The federal government can, however, provide technical assistance and funding to water utilities that are struggling with health violations.

Scott Pruitt, the head of the E.P.A., has expressed interest in modernizing the nation's water infrastructure, telling Congress this month that he wants to declare a "war on lead." He has not yet detailed a plan for doing so, although he has supported increases in funding for an E.P.A. program that can provide low-interest loans for state water projects.

But environmental groups like Natural Resources Defense Council have viewed Mr. Pruitt's promises with suspicion, asserting that the Trump administration's push for sharp budget cuts to other important federal drinking water programs at both the E.P.A. and the Department of Agriculture could end up undercutting water safety.

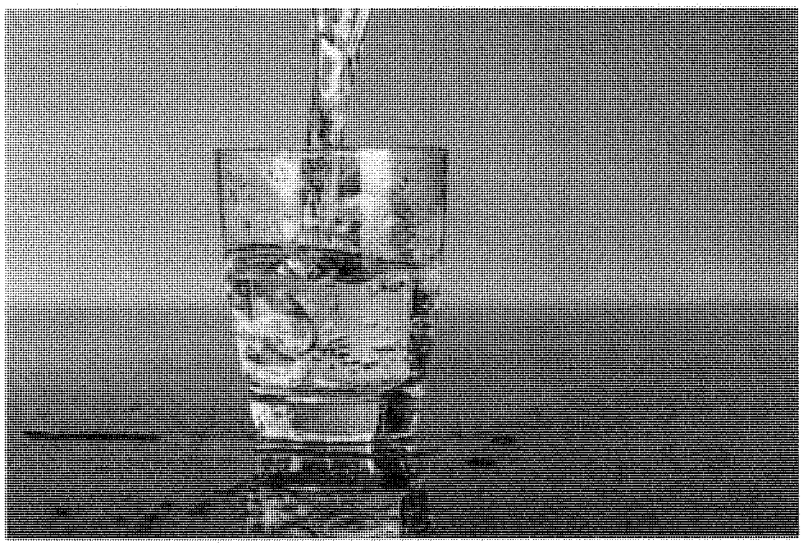
Across Oklahoma

Nasty Pollutants In Oklahoma Drinking Water Put Your Health At Risk

What's legal isn't necessarily safe when it comes to your drinking water.

By Jen Semler | Jul 26, 2017 11:05 am CT | Updated Jul 26, 2017 11:39 am CT

Reply



When water flows out of the faucet and into a glass, it usually appears clean and healthy. A report released Wednesday, though, found hundreds of harmful contaminants across the American water supply that can cause cancer, developmental issues in children, problems in pregnancy and other serious health conditions.

"There are chemicals that have been linked to cancer, for example, that are found above health-based limits, or health guidelines, in the water of more than 250 million Americans," said Nneka Leiba, director of Healthy Living Science at the Environmental Working Group, or EWG, an independent nonprofit organization that released a detailed account of the contaminants.

EWG, in conjunction with outside scientists, assessed health-based guidelines for hundreds of chemicals found in our water across the country and compared them to the legal limits. The law often permits utilities to allow these dangerous chemicals to pollute our waters.

In Oklahoma, EWG found 77 contaminants across the state's water supply. Of these, 18 were detected above either health or legal limits. Visit the EWG database to see which substances are in your drinking water and the risks that they pose.

"There are more than 250 contaminants across our nation's drinking water," said Leiba. "About 160 of those are unregulated. And that's a big concern, because if a chemical is unregulated, that means it can be present in our water at any level — and be legal." Most of the water in the United States comes from local utilities that measure contaminants in their water supply, but this data can be difficult to obtain. (*More below*)

Contaminants in your water: *EWG has released a public database cataloguing contaminants in water systems in every state in the country — the first comprehensive database of its kind that took two years to build. First select the state where you live, and you'll see state-level data. For more local information, enter your zip code.*
After you enter your zip code, you'll be directed to a page showing the water utilities in your county. Select your town to see which contaminants put your families at risk.
No single group has collected all this information for all 50 states in an easily searchable database — until now. And it's incredibly easy to use it to see what contaminants are coming through your faucet.

What You Can Do

Once people know about the high levels of dangerous contaminants lurking in their water, the question becomes what they can do to protect their health.

"There's a way to reduce those levels simply by buying a water filter," said Leiba.

"We don't want to scare the population by saying there are 250 chemicals and just leaving it there," she continued. "As a consumer you may look at it and get a little overwhelmed."

For this reason, EWG provides a guide to buying water filters. Its website allows you to search for filters that block particular chemicals and pollutants. If you find that your local water supply has a particularly high level of a dangerous chemical, you can search for a filter that blocks that substance.

There are many types of filters, including carbon filters, deionization filters and distillation filters. Each type has its own strengths and weakness, so sometimes a filter will include multiple filtration methods to eliminate more potential threats.

To find the most effective filter, look for certifications from the Water Quality Association and NSF International. Different filters remove different contaminants.

It's important to remember, though, that even high-quality filters are not 100 percent effective.

"Filters don't remove everything," Scott Meschke, professor of environmental and occupational health sciences at Washington University, told Patch. He emphasized that it's important to make sure you're using a filter that is designed to fit your local needs.

He also said that users should change water filters on a regular basis. Old filters that are never replaced can host bacterial, which also pose potential dangers.

People who don't get their water through a public utility will have different needs.

"If you are on a private well, I would say that you need to be monitoring your water. You should be paying on a regular basis to have it tested," Meschke said.

Read more about the risks and the government's role regulating water safety>>

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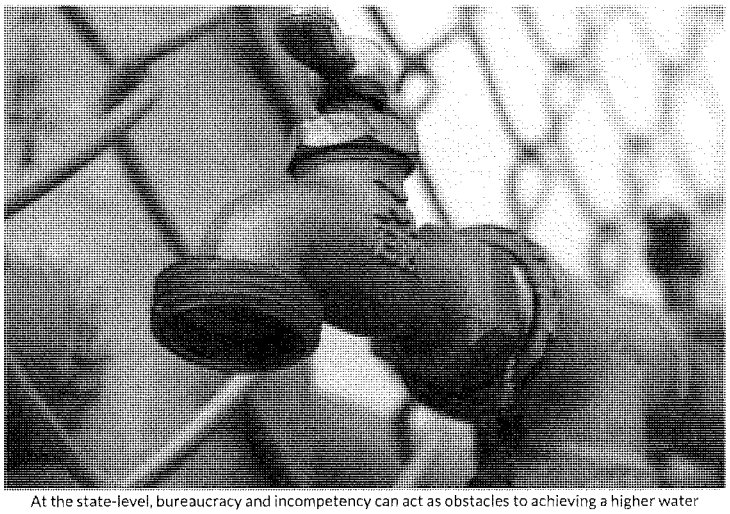

At the state-level, bureaucracy and incompetency can act as obstacles to achieving a higher water quality. Courtesy flickr

Oklahoma's water quality among lowest in nation

A recent study revealed Oklahoma and Texas as hotbeds for violations of federal clean drinking water regulations.

As if Oklahoma didn't have enough problems on its plate, it will now have to add potentially unclean water to the menu. A study published last month from the Proceedings of the National Academy of Sciences tracked violations of the federal Safe Drinking Water Act over the past 35 years and identified two states in particular that have struggled to maintain standards for clean drinking water: Texas and Oklahoma.

The study revealed that between 2004 and 2015, more than a dozen Oklahoma counties, all of them rural, recorded between 25 and 50 violations. As a point of reference, Genesee, the county containing Flint, Michigan, had just five violations over the same span. Several of the most egregiously offending

Oklahoma water systems belong to counties directly adjacent to Tulsa, including Osage, Pawnee and Wagoner.

Maura Allaire, one of the lead authors of the study, spoke about trends connecting the offending communities, calling them "smaller communities flying under the radar." She added that addressing the problem could be a matter of money and resources: "They're struggling to maintain their aging infrastructure, and they're struggling to keep up with the latest water treatment techniques."

It seems evident, at least with regard to the extensive issues in Oklahoma and Texas specifically, that there is
more to the story than a simple lack of funds. There must be something to explain the disparity between the trouble spots in the two states and other similarly impoverished, rural counties across the nation.

TU professor Marsha Howard, who researches deadly amoebas in lakes and rivers throughout the southern states, believes that the scorching heat of Oklahoma's summers could have something to do with it.

"It has a lot to do with temperatures," she said. "One of the issues that I noted was what they call DBPs, disinfection byproducts. As a result of the increase of organic matter [in the water] in the summer, with rising levels of protozoa, E. coli and other bacteria, they have to increase disinfection, and then there are more byproducts as a result of that in the water. And that apparently is one of the things that is listed as a violation."

She insisted, however, that this sort of violation is far from the worst that a community could deal with when it comes to its drinking water. In the past several years, she studied cases of amoebas found in New Orleans's tap water, a result of employees falsifying chlorination reports and failing to properly sanitize the water supply.

"If the worst thing we're primarily seeing in the state of Oklahoma is the disinfection byproducts," she said, "I'm okay with that. That means they are disinfecting the water, and I'd rather see that than the high coliform [a type of bacteria] counts. So our high levels of disinfection are a good thing. We might have funny-tasting water sometimes, but that's what we pay for having safe water."

Still, the full extent of the problems facing the water supply, both in Oklahoma and around the country, remains uncertain. Since state governments are usually in charge of maintaining federal water quality standards, bureaucracy and incompetency can affect their implementation. In other cases, budgetary cutbacks can force local municipalities to focus on only certain types of contaminants, which in turn results in underreporting of other factors of safety and cleanliness. Dr. Kristi Pullen Fedinick of the Natural Resources Defense Council has said that a "huge amount" of such underreporting is known to the scientific community to exist on a national scale.

To combat this, Howard believes that some degree of involvement from D.C. may be necessary. "I know people are concerned with big government and not having them involved in our lives," she said, "but I don't see any other way around having regulations for things of this nature."

Oklahoma's own Scott Pruitt, the head of the Environmental Protection Agency, has expressed public concern for the quality of America's drinking water and has recently announced his desire to begin a war on lead. It remains to be seen whether the EPA will be able to make any visible impact, especially given

the Trump administration's insistence on making across-the-board budget cuts to environmental programs.

Categories: News (https://tucollegian.org/category/news/) | / by Justin Guglielmetti (https://tucollegian.org/author/justin-guglielmetti/)

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Senator BARRASSO. Would any of you like to respond to the comments? And then we will just give each of you a chance to make a final statement as we wrap up the hearings.

Mr. GORDON. Mr. Chairman, thank you for that opportunity.

With apologies, Ranking Member, I think I have forgotten to recognize you the last couple of times. My apologies for that.

Senator Gillibrand, thank you very much for your comments. I think we live in a Nation, that, going back to our Constitution, always has recognized the importance of the Federalist principles. If memory serves, one of the big arguments in the original documentation was whether New York would actually expand west beyond its normal boundaries that we perceive today.

So I very much appreciate it. I have a daughter who actually is a beneficiary of that great, clean water.

Wyoming has the largest amount of class one water in the country—excuse me, class one air in the country, and yet we are affected continually by pollution from Seattle, from Portland, from San Francisco, et cetera. I think we have to recognize these principles, and I think my point here is that together, focusing on water quality and our ability to regulate within the State, that is critical.

When that is used as an impediment to commerce, that is a constitutional issue, and I think this particular Act that is contemplated actually recenters that conversation on what the original intent of the 1972 law was, which was to protect water quality.

Thank you very much.

Senator BARRASSO. Governor Stitt, and then Ms. Watson.

Mr. STITT. Thank you, Chairman.

I think, Senator, if the American people, if you think that the American people don't know really what is happening when your Governor denies permits based on 401 water quality on Earth Day, on pipeline development, I think American people see right through that.

I think this is about a hatred of the fossil fuel industry. It has nothing to do with water quality.

Senator BARRASSO. Ms. Watson, any final comment?

Thank you.

Well, I thank all of you. We had 16 Senators show up for this hearing today, 11 had a chance to ask questions, 5 due to other commitments had to leave before it was their turn, so this has quite a bit of interest. Some of the other members may submit written questions for part of the record.

I am very grateful for all of you being here.

The hearing record will remain open for an additional 2 weeks, but I want to thank all of our witnesses for their testimony today on this very important topic, and the hearing is adjourned.

Senator CARPER. Mr. Chairman, before we adjourn, could I just make several unanimous consent requests, please? I want to submit for the record a letter dated November 18th from the Council of State Governments.

Senator BARRASSO. Without objection.

[The referenced information was not received at time of print.]

Senator CARPER. Another from the State of Washington, dated September 26th, 2017.

Senator BARRASSO. Without objection.
[The referenced information follows:]

STATE OF WASHINGTON
DEPARTMENT OF ECOLOGY
PO Box 47600 • Olympia, WA 98504-7600 • 360-407-6000
711 for Washington Relay Service • Persons with a speech disability can call 877-833-6341

September 26, 2017

Millennium Bulk Terminals-Longview, LLC
ATTN: Ms. Kristin Gaines
4029 Industrial Way
Longview, WA 98632

RE: Section 401 Water Quality Certification Denial (Order No. 15417) for Corps Public Notice No. **2010-1225** Millennium Bulk Terminals-Longview, LLC Coal Export Terminal – Columbia River at River Mile 63, near Longview, Cowlitz County, Washington

Dear Ms. Gaines:

The Washington State Department of Ecology (Ecology) has reached a decision on the Millennium Bulk Terminals-Longview request for a Section 401 Water Quality Certification for the proposed coal export terminal near Longview. After careful evaluation of the application and the final State Environmental Policy Act environmental impact statement, Ecology is denying the Section 401 Water Quality Certification with prejudice.

The attached Order describes the specific considerations and determinations made by Ecology in support of this decision to deny the Certification with prejudice. Your right to appeal this decision is described in the enclosed denial Order.

Sincerely,

Maia D. Bellon
Director

Enclosure

By certified mail [91 7199 9991 7034 8935 6995]

cc: Muffy Walker, U.S. Army Corps of Engineers
Danette Guy, U.S. Army Corps of Engineers
Glenn Grette, Grette Associates, LLC

IN THE MATTER OF DENYING SECTION 401 WATER QUALITY CERTIFICATION TO Millennium Bulk Terminals-Longview, LLC in accordance with 33 U.S.C. §1341 (FWPCA § 401), RCW 90.48.260, RCW 43.21C.060, WAC 197-11-660, WAC 173-802-110, and Chapter 173-201A WAC	))))))))	**ORDER # 15417** **Corps Reference #NWS-2010-1225** Millennium Bulk Terminals-Longview, LLC Coal Export Terminal – Columbia River at River Mile 63, near Longview, Cowlitz County, Washington

TO: Millennium Bulk Terminals-Longview, LLC
Attention: Ms. Kristin Gaines
4029 Industrial Way
Longview, Washington 98632

On February 23, 2012, Millennium Bulk Terminals-Longview, LLC (Millennium) submitted a Joint Aquatic Resources Permit Application (JARPA) to the Department of Ecology (Ecology) requesting a Section 401 Water Quality Certification to construct a coal export terminal in Longview, Washington. Then on January 28, 2013, Millennium sent a letter to the U.S. Army Corps of Engineers (Corps) and Ecology in which Millennium withdrew the request for the Section 401 Certification. Millennium stated that it would submit a new request when the Environmental Impact Statement (EIS) process concluded. In addition, on February 6, 2013, Millennium submitted an Ecology Water Quality Certification Processing Request form stating that it wished to withdraw its request and would resubmit near the end of the EIS process.

On July 18, 2016, Millennium submitted a new JARPA and request for Section 401 Water Quality Certification. A notice regarding this request was distributed as part of a Corps joint public notice on September 30, 2016. On June 22, 2017, Ecology received a withdrawal/reapply form from Millennium, which triggered another public notice that was issued on June 27, 2017.

Millennium proposes to construct and operate a coal export terminal (Project) in and adjacent to the Columbia River (at approximately river mile 63) that would transfer up to a nominal 44 million metric tons per year (MMTPY) of coal from trains to ocean-going vessels. The completed coal export terminal would cover approximately 190 acres of the approximately 540-acre property. The Project would consist of two docks, ship loading systems, stockpiles and equipment, rail car unloading facilities, an operating rail track, rail storage tracks to park up to eight trains, associated facilities, conveyors, and necessary dredging. The Project would be constructed in two stages over several years.

- Stage 1 of the Project would consist of facilities to unload coal from trains, stockpile the coal on site, and load coal into ocean-going vessels at one of the two new docks. During Stage 1, Millennium would construct two docks (Dock 2 and 3), one ship loader and related conveyors on Dock 2, berthing facilities on Dock 3, a stockpile area including two stockpile pads, railcar unloading facilities, one operating rail track, up to eight rail storage tracks for train parking, Project site

ground improvements, and associated facilities and infrastructure. Once Stage 1 is completed, the Project would be capable of a throughput capacity of a nominal 25 MMTPY.

- During Stage 2, MBTL would construct an additional ship loader on Dock 3, two additional stockpile pads, conveyors, and equipment necessary to increase throughput by approximately 19 MMTPY, to a total nominal throughput of 44 MMTPY.

The main elements of Stage 1 development would include:

- Rail bed.
- Rail loop with arrival and departure tracks to include one operating track (turn around track) and eight rail storage tracks.
- One tandem rotary unloader (capable of unloading two rail cars) for operations, and one tandem rapid discharge unloader to be used during startup and maintenance.
- Two coal stockpile pads, Pads A and B.
- Two rail-mounted luffing/slewing stackers and associated facilities for Pads A and B.
- Two rail-mounted bucket-wheel reclaimers and associated facilities for Pads A and B.
- Two shipping docks (Dock 2 and Dock 3), with one ship loader and associated facilities on Dock 2.
- Conveyors, transfer stations, and surge bin from the stockpile pads to the ship loading facilities.
- In-bound and out-bound coal sampling stations.
- Support structures, electrical transformers, switchgear and equipment buildings, and process control systems.
- Upland facilities, including roadways, service buildings, water management facilities, utility infrastructure, and other ancillary facilities.

The main elements of Stage 2 development would include:

- Associated conveyors and transfer stations to the stockpile Pads C and D from the rail receiving station.
- Two additional coal stockpile pads, Pads C and D.
- Two additional rail-mounted luffing/slewing stackers and associated facilities.
- Two additional rail-mounted bucket-wheel reclaimers and associated facilities.
- One additional ship loader and associated facilities on Dock 3.
- Conveyors, transfer stations, and surge bins from stockpile Pads C and D to the ship loading facilities.

The Project proposes impacting over 32 acres of wetlands (24 acres of which will be new impacts) and almost 6 acres of ditches. To offset these impacts Millennium has proposed to

construct a wetland mitigation site that encompasses approximately 100 acres. The Project will also have 4.83 acres of new overwater coverage, and includes constructing an off-channel slough mitigation site to address those impacts.

I. AUTHORITIES

In exercising its authority under 33 U.S.C. § 1341, RCW 43.21C.060, and RCW 90.48.260, Ecology has examined this application pursuant to the following:

1. Conformance with applicable water quality-based, technology-based, and toxic or pre-treatment effluent limitations as provided under 33 U.S.C. §§ 1311, 1312, 1313, 1316, and 1317 (FWPCA §§ 301, 302, 303, 306, and 307).

2. Conformance with the state water quality standards contained in Chapter 173-201A WAC and authorized by 33 U.S.C. § 1313 and by Chapter 90.48 RCW, and with other applicable state laws.

3. Conformance with the provision of using all known, available, and reasonable methods to prevent and control pollution of state waters as required by RCW 90.48.010.

4. Conformance with applicable State Environmental Policy Act (SEPA) policies under RCW 43.21C.060 and WAC 173-802-110.

Pursuant to the foregoing authorities and in accordance with 33 U.S.C. § 1341, RCW 90.48.260, RCW 43.21C.060, Chapter 173-200 WAC, Chapter 173-201A WAC, WAC 197-11-660, WAC 173-802-110, and Chapter 173-201A WAC, as more fully explained below, Ecology is denying the Millennium Bulk Terminals-Longview request for Section 401 Water Quality Certification with prejudice.

II. STATE ENVIRONMENTAL POLICY ACT (SEPA)

The Final Environmental Impact Statement (FEIS) issued by Cowlitz County and Ecology on April 28, 2017, identified nine areas of unavoidable and significant adverse impacts that would result from the construction and operations of the Project. As analyzed in the FEIS, the detrimental environmental consequences related to these impacts cannot be reasonably mitigated. Further, the adverse impacts to the built and natural environments conflict with Ecology's SEPA policies found in WAC 173-802-110. These policies state:

> (1)(a) The overriding policy of the department of ecology is to avoid or mitigate adverse environmental impacts which may result from the department's decisions.
>
> (b) The department of ecology shall use all practicable means, consistent with other essential considerations of state policy, to improve and coordinate plans, functions, programs, and resources to the end that the state and its citizens may:

(i) Fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;

(ii) Assure for all people of Washington safe, healthful, productive, and aesthetically and culturally pleasing surroundings;

(iii) Attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;

(iv) Preserve important historic, cultural, and natural aspects of our national heritage;

(v) Maintain, wherever possible, an environment which supports diversity and variety of individual choice;

(vi) Achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and

(vii) Enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

(c) The department recognizes that each person has a fundamental and inalienable right to a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.

(d) The department shall ensure that presently unquantified environmental amenities and values will be given appropriate consideration in decision making along with economic and technical considerations.

A. Significant Unavoidable Adverse Impacts

1. Air Quality. The FEIS found a significant increase in cancer risk for areas along rail lines and around the Project site in Cowlitz County where diesel emissions primarily from trains would increase. The study found that residents in some areas in Cowlitz County, including those living in portions of the Highlands neighborhood, would experience an increase in cancer risk rate up to 30 cancers per million. These levels of increased risk exceed the approvability criteria in WAC 173-460-090 for new sources that emit toxic air pollutants. Although WAC 173-460 only applies to stationary sources, the health risks from mobile sources in this case, primarily locomotives, would be considered significant using the same approvability criteria. Thus, the FEIS concluded the emission of diesel particulate primarily from train locomotives would be a significant unavoidable adverse impact. As the FEIS explained, this impact could be mitigated, but not eliminated, by use of cleaner burning Tier 4 locomotives. However, use of such locomotives is outside the control of Millennium and may not

occur for decades because use of older locomotives is currently allowed under federal law. Other mitigation measures identified in the FEIS related to air quality, such as use of best management practices and compliance with permits, would not reduce diesel emissions from Project related locomotives.

The increased cancer risk associated with the Project is a significant adverse unmitigated impact that is inconsistent with the following substantive SEPA policies in WAC 173-82-110:

- Fulfill the responsibilities of each generation as trustee of the environment for succeeding generations.
- Assure for all people of Washington safe, healthful, productive, and aesthetically and culturally pleasing surroundings.
- Attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences.

2. **Vehicle Transportation.** The FEIS found that there would be significant unavoidable adverse impacts to vehicle traffic from the proposed action when the Project reaches full operation in 2028 due to vehicle delays caused by increased train traffic that would block rail crossings in Cowlitz County. With current track infrastructure on the Reynolds Lead and BNSF Railway (BNSF) spur, Project-related trains in 2028 would increase the total gate downtime by over 130 minutes during an average day at the six crossings listed below. Project-related trains would cause these crossings to operate at Level of Service E or F[1] if one Project-related train traveled during peak traffic hours through the following crossings:

- Project area access opposite 38th Avenue
- Weyerhaeuser access opposite Washington Way
- Industrial Way
- Oregon Way
- California Way
- 3rd Avenue

[1] "Level of Service" is a report card rating based on the delay experienced by vehicles at an intersection or railroad crossing. Level of Service A, B, and C indicate conditions where traffic moves without substantial delays. Level of Service D and E represent progressively worse operating conditions. Level of Service F represents conditions where average vehicle delay has become excessive and demand has exceeded capacity.

Millennium and BNSF may make track improvements to the Reynolds Lead and BNSF spur that would allow trains to travel faster through these intersections and thereby reduce gate downtimes. However, even with these planned track improvements to the Reynolds Lead and BNSF Spur, the Project at full build out in 2028 would still adversely impact and add delays at four crossings, and cause the following crossings to operate at Level of Service E or F if two proposed Project-related trains traveled through them during peak traffic hours:

- Project area access opposite 38th Ave
- Weyerhaeuser access opposite Washington Way
- 3rd Avenue
- Dike Road

On the BNSF main line in Cowlitz County, the increased Project-related trains at full build out in 2028 could adversely impact vehicle transportation at two crossings during peak traffic hours. The following crossings would operate Level of Service E if two Project-related trains travel during the peak hours:

- Mill Street
- South River Road

Delay of emergency vehicles at rail crossing would also increase because of additional Project-related trains.

As described in the FEIS, Millennium has agreed or may be required to implement several mitigation measures to address these impacts. These measures include funding crossing gates at the intersection of Industrial Way, holding safety review meetings, and notifying agencies about increases in operations on the Reynolds Lead. However, these measures will not reduce or eliminate the vehicle delays identified in the FEIS. Vehicle delays could be reduced by further improvements to rail and road infrastructure, however, it is currently unknown when or if such improvements would occur. Therefore, when the Millennium Project is at full operation in 2028, unavoidable and significant adverse impacts would occur on vehicle transportation at certain crossings in Cowlitz County including delays of emergency vehicles. This impact is inconsistent with the following substantive SEPA policies:

- Assure for all people of Washington safe, healthful, productive, and aesthetically and culturally pleasing surroundings.
- Attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences.
- Maintain, wherever possible, an environment which supports diversity and variety of individual choice.

- Achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities.

3. Noise and Vibration. The FEIS found that there would be significant unavoidable adverse impacts to residences near four public at-grade crossings along the Reynolds Lead and BNSF spur from train-related noise. Train-related noise levels would increase from train operations and locomotive horn sounding intended for public safety.

Residences near the at-grade crossings at 3rd Avenue, California Way, Oregon Way, and Industrial Way would experience increased daily noise levels that would exceed applicable noise criteria per Federal Transportation Administration/Federal Rail Administration guidance.

Approximately 229 residences would be exposed to moderate noise impacts, and approximately 60 residences would be exposed to severe noise impacts. Although these impacts would be reduced near the Industrial Way and Oregon Way crossings if a grade-separated intersection is constructed there as currently proposed, the proposal has not yet received permits and its completion date is unknown.

As described in the FEIS, Millennium has agreed or may be required to implement several mitigation measures to address these train-related noise impacts. These measures include funding two "quiet crossings" at Oregon Way and Industrial Way grade crossings by installing crossing gates, barricades, and additional electronics. This proposed "quiet crossing" is not the same as a Quiet Zone, which requires the approval of the Federal Railroad Administration. The reduction of noise pollution from the proposed "quiet crossing" is unknown because Millennium trains may still be required to sound their horns at the intersections. Other measures include requiring Millennium to work with the City of Longview, Cowlitz County, Longview Switching Company, the affected community, and other applicable parties to apply for and implement a Quiet Zone that would include the 3rd Avenue and California Avenue crossings. However, as a Quiet Zone requires the approval of the Federal Railroad Administration, it is beyond the control of Millennium and it is unknown if it will ever be implemented. Consequently, Quiet Zones are not considered an applicable mitigation measure.

The FEIS states that, if the Quiet Zone is not implemented, Millennium would fund a sound-reduction study to identify ways to mitigate the moderate and severe impacts from train noise. However, it is unknown who would fund, implement, and maintain recommendations to mitigate moderate and severe noise impacts identified in the sound noise reduction study. The study itself does not mitigate the impacts. The Project's significant adverse impacts from noise are inconsistent with the following substantive SEPA policies:

- Fulfill the responsibilities of each generation as trustee of the environment for succeeding generations.

- Assure for all people of Washington safe, healthful, productive, and aesthetically and culturally pleasing surroundings.
- Maintain, wherever possible, an environment which supports diversity and variety of individual choice.
- Attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences.

4. **Social and Community Resources.** The FEIS found that social and community resources would be significantly and adversely impacted by increased noise, vehicle delays, and air pollution. Impacts from the construction and operation of the Project would impact minority and low-income populations by causing disproportionately high and adverse effects. Impacts from noise, vehicle delay, and diesel particulate matter inhalation risk would affect the Highlands neighborhood, a minority and low-income neighborhood adjacent to the Reynolds Lead in Longview, Washington.

a. Adverse Health Impact from Increased Cancer Risk Rate: Project-related trains and other operations would increase diesel particulate pollution along the Reynolds Lead, BNSF Spur, and BNSF mainline in Cowlitz County at levels that would result in increased cancer risk rates. The modeled cancer risk rate in the FEIS found a majority of the Highlands neighborhood would experience an increased cancer risk rate, varying from 3% to 10%. Use of Tier 4 locomotives, which produce less diesel pollution, by BNSF would reduce but not eliminate diesel particulate matter emissions and the associated potential cancer risk in the Highlands neighborhood. However, requiring Tier 4 locomotives is outside the control of Millennium and may not occur for decades. Therefore, the Project's disproportionately high adverse effects related to increased cancer risk rates from diesel particulate matter inhalation on minority and low-income populations would be unavoidable.

b. Adverse Noise Impact: The Project would add 16 trains per day on the Reynolds Lead and increase average daily noise levels, which would exceed applicable criteria for noise impacts and cause moderate to severe impact to 289 residences in the Highlands neighborhood. Approval, funding, and construction of Quiet Zones for four highway and rail intersections would reduce noise levels. However, there is no sponsor(s) identified to apply for, fund, and maintain Quiet Zones that would reduce noise levels at the four rail crossings. Quiet Zones are outside the control of Millennium and require approval from the Federal Railroad Administration. Therefore, Project-related trains would cause significant adverse unavoidable impacts to portions of the Highlands neighborhood and cause a disproportionately high adverse effect on minority and low-income populations.

c. Adverse Vehicle Traffic Impact: Project-related trains would increase vehicle delays at highway and rail intersections within the Highlands

neighborhood. With the current track infrastructure on the Reynolds Lead, a Millennium-related train traveling during the peak traffic hours would result in a vehicle-delay impact at four public at-grade crossings in or near the Highlands neighborhood by 2028. This would constitute a disproportionately high adverse effect on minority and low-income populations. If planned improvements to the Reynolds Lead are made, the adverse impacts related to vehicle delay could be reduced but not eliminated. However, rail improvements have not received permits and their completion is unknown. Therefore, Millennium's disproportionately high adverse effects to vehicle traffic on minority and low-income populations would be unavoidable.

5. **Rail Transportation.** The FEIS found that the Project would cause significant adverse effects on rail transportation that cannot be mitigated. At full build out of the Project, 16 trains a day (8 loaded and 8 empty) would be added to existing rail traffic. Three segments on the BNSF main line routes in Washington (Idaho/Washington State Line–Spokane, Spokane–Pasco, and Pasco–Vancouver) are projected to exceed capacity with the current projected baseline rail traffic in 2028. Adding the 16 additional Millennium-related trains would contribute to these three segments exceeding capacity by 2028, based on the analysis in the FEIS and assuming existing infrastructure. As described in the FEIS, Millennium would mitigate some of the impacts by notifying BNSF and Union Pacific (UP) about upcoming increases in operations at the Millennium site. This proposed mitigation measure is informational and does not commit BNSF or UP to take action to increase capacity.

BNSF and UP could make necessary investments or operating changes to accommodate the rail traffic growth, but it is unknown when these actions would be taken or permitted. Improving rail infrastructure is outside the control of Millennium and cannot be guaranteed. Under current conditions Millennium-related trains would contribute to these capacity exceedances at three rail segments on the main line and could result in an unavoidable and significant adverse impact on rail transportation, including delays and congestion.

This impact is inconsistent with the following substantive SEPA policies:

- Fulfill the responsibilities of each generation as trustee of the environment for succeeding generations.
- Assure for all people of Washington safe, healthful, productive, and aesthetically and culturally pleasing surroundings.
- Attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences.

6. **Rail Safety.** The FEIS found that Millennium-related trains would increase the train accident rate by 22 percent along the rail routes in Cowlitz County and Washington. As described in the FEIS, Millennium would notify BNSF and UP about upcoming increases in operations at the Millennium site. However, this notification measure does not commit BNSF or UP to take action or make changes that would reduce accident rates.

To reduce some of the impacts to rail safety, the Longview Switching Yard, BNSF, and UP could improve rail safety through investments or operational changes, but it is unknown when or whether those actions would be taken or permitted. Improving rail infrastructure to increase rail safety is outside the control of Millennium and cannot be guaranteed. Therefore, the 22 percent increase to the rail accident rate over baseline conditions attributable to Millennium would result in unavoidable and significant adverse impacts on rail safety.

This impact is inconsistent with the following substantive SEPA policies:

- Fulfill the responsibilities of each generation as trustee of the environment for succeeding generations.
- Assure for all people of Washington safe, healthful, productive, and aesthetically and culturally pleasing surroundings.
- Attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences.

7. **Vessel Transportation.** The FEIS found that the Project would have significant adverse effects on vessel transportation that cannot be mitigated. Millennium would add 1,680 ship transits to the current 4,440 ship transits on the Columbia River per year, for a total of 6,120 at full build out. Thus, the Project would be responsible for over one quarter of the traffic in the Columbia River.

Based on marine accident transportation modeling, the FEIS found the increased vessel traffic would increase the frequency of incidents such as collisions, groundings, and fires by approximately 2.8 incidents per year. While the chance that an incident would result in serious damage or spill is low, if a spill were to happen, the impacts to the environment and people would be significant and unavoidable.

An increase in vessels calling at the proposed new docks increases the risk of vessel-related emergencies, such as fire or vessel allision. An increase in vessels calling at the new docks also increases risk of spills from refueling ships at berth, although Millennium has stated there would be no refueling at the new docks. The FEIS proposes a mitigation measure that if refueling at the docks were to start, the company would notify Cowlitz County and Ecology. Another mitigation measure in the FEIS involves Millennium's attending at least one Lower Columbia Harbor Safety Committee meeting per year.

Although these proposed mitigation measures would support communication and awareness, they would not reduce environmental harm or the impact of an incident.

If a Millennium-related vessel incident such as a collision or allision were to occur, impacts could be adverse and significant, depending on the nature and location of the incident, the weather conditions at the time, and whether any oil were discharged. Although the likelihood of a serious Millennium-related vessel incident is low, the consequences would be severe and there are no mitigation measures that can completely eliminate the possibility of an incident or the resulting impacts. *See* WAC 197-11-794(2) (an impact may be significant if its chance of occurrence is not great but the resulting environmental impact would be severe if it occurred).

This adverse impact is inconsistent with the following Ecology SEPA policies:

- Fulfill the responsibilities of each generation as trustee of the environment for succeeding generations.
- Assure for all people of Washington safe, healthful, productive, and aesthetically and culturally pleasing surroundings.
- Attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences.

8. Cultural Resources. The FEIS found that construction of the coal export terminal would demolish the Reynolds Metals Reduction Plant Historic District, which would be an unavoidable and significant adverse environmental impact. Construction of the Project would demolish 30 of the 39 identified resources that contribute to the historical significance of the Historic District. The anticipated adverse impacts on these resources would diminish the integrity of design, setting, materials, workmanship, feeling, and association that make the Historic District eligible for listing in the National Register of Historic Places.

A Memorandum of Agreement is currently being negotiated among the Corps, Cowlitz County, the Washington Department of Archaeologic and Historic Preservation, the City of Longview, the Bonneville Power Administration, the National Park Service, potentially affected Native American tribes, and Millennium in a separate federal process. The Memorandum may resolve this impact in compliance with Section 106 of the National Historic Preservation Act of 1966. However, there is no indication when or if this Memorandum will be signed by all parties. Without the Memorandum, the impacts to the Reynolds Metal Reduction Plant Historic District are considered adverse, significant, and unavoidable.

Demolition of historic properties without mitigation is inconsistent with the following Ecology SEPA policies:

- Fulfill the responsibilities of each generation as trustee of the environment for succeeding generations.
- Preserve important historic, cultural, and natural aspects of our national heritage.

9. **Tribal Resources.** The FEIS found that construction and operation of the Millennium coal export terminal could result in unavoidable indirect impacts on tribal resources. Tribal resources refer to tribal fishing and gathering practices and treaty rights. These resources may include plants or fish used for commercial, subsistence, and ceremonial purposes.

Construction activities such as building new docks, river bottom dredging, and pile driving would cause physical and behavioral responses in fish that could result in injury, and would affect aquatic habitat. Fish stranding associated with wakes from the additional 1,680 vessel trips per year would also cause injury. Eulachon would potentially be impacted by the initial and maintenance sediment dredging.

Fugitive coal dust particles generated by the Millennium operations and additional trains would enter the aquatic environment through movement of coal into and around the Project area and during rail transport. Fugitive coal dust and potential spills would increase suspended solids in the Columbia River.

These impacts could reduce the number of fish surviving to adulthood and returning to Zone 6 of the Columbia River, and could affect the number of fish available for harvest by Native American Tribes.

The increase in 16 additional Millennium-related trains per day travelling through areas adjacent to and within the usual and accustomed fishing areas of Native American Tribes would restrict access to 20 tribal fishing sites set aside by the U.S. Congress above Bonneville Dam in the Columbia River. There are additional access sites that are not mapped that would also be impacted.

To reduce impacts to tribal resources from construction, Millennium could be required to minimize underwater noise during pile driving, conduct advance underwater surveys for eulachon prior to in-water work, and conduct fish monitoring prior and during dredging.

These mitigation steps are inadequate because although noise impacts from construction would be reduced, they would not be eliminated, and fish behavior could be altered and affect the number of fish available for harvest by Native American Tribes.

Improving rail infrastructure for access to tribal fishing sites along the Columbia River above Bonneville Dam is outside the control of Millennium. The additional Project-related trains travelling through areas adjacent to and within the usual and accustomed fishing areas of Native American Tribes could restrict access to tribal fishing areas in the

Columbia River. Because other factors besides rail operations affect fishing opportunities, such as number of fishers, fish distribution, and the timing and duration of fish migration periods, the extent to which Project-related rail operations would affect tribal fishing is difficult to quantify. However, SEPA policies state that "presently unquantified environmental amenities and values will be given appropriate consideration in decision making along with economic and technical considerations." Consistent with this policy, Ecology concludes that Millennium at full operations would result in unavoidable significant adverse impacts to tribal resources.

Impacts to tribal resources are inconsistent with the following Ecology SEPA policies:

- Fulfill the responsibilities of each generation as trustee of the environment for succeeding generations.
- Preserve important historic, cultural, and natural aspects of our national heritage.
- The department shall ensure that presently unquantified environmental amenities and values will be given appropriate consideration in decision making along with economic and technical considerations.

III. SECTION 401 WATER QUALITY CERTIFICATION

Pursuant to Section 401 of the Clean Water Act, in order for Ecology to issue a water quality certification it must have reasonable assurance that the Project as proposed will meet applicable water quality standards and other appropriate requirements of state law. Consequently, an applicant must submit adequate information regarding a project for agency review before Ecology can determine compliance with the state water quality standards and other applicable regulations. Millennium's current application and supplemental documents fails to demonstrate reasonable assurance in the following areas:

A. Wetlands Impacts and Mitigation

The Project would impact (fill) 32.31 acres of wetlands, 8.1 acres of which occurred prior to Millennium's tenancy of the site, and 0.11 of which would be impacted at the mitigation site. The impacts include 28.32 acres of Category III wetlands and 3.99 acres of Category IV wetlands. For the reasons stated below, Millennium failed to demonstrate that the impacts and mitigation associated with the wetlands within the Project area will comply with Washington State water quality standards. Thus, Millennium failed to demonstrate reasonable assurance that the Project will meet water quality standards.

1. **Mitigation Plan.** The draft wetland mitigation plan is inadequate and does not demonstrate that the proposed mitigation will offset the Project's wetland impacts. Millennium submitted a conceptual mitigation plan to Ecology on June 8, 2017 (*Millennium Coal Export Terminal, Longview, Washington Coal Export Terminal including Docks 2 and 3 and Associated Trestle Conceptual Mitigation Plan—Wetlands and Aquatic Habitat*, dated May 25, 2017). In response to Ecology's questions,

Millennium submitted additional information on September 20, 2017. However, the submitted information continues to be deficient because it lacks an adequate credit/debit analysis, a boundary verification, and adequate hydrologic information regarding the mitigation site.

2. **Wetland Boundaries at the Impact Site.** Millennium has not demonstrated that the boundaries of the wetlands to be impacted have been verified by the Corps. There is no jurisdictional determination (JD) from the Corps stating whether the wetlands are waters of the United States or whether the Corps agrees with the boundaries as shown in the delineation report (Millennium Coal Export Terminal, Longview, Washington, Coal Export Terminal Wetland and Stormwater Ditch Delineation Report – Parcel 619530400, dated September 1, 2014). Millennium's application therefore does not adequately quantify the extent of the wetland impacts and does not adequately demonstrate that the proposed mitigation will offset those impacts.

3. **Credit-Debit Analysis.** This analysis is needed to determine whether proposed mitigation would adequately offset the Project's wetland impacts. It is especially important for a project of this scale, and where the impacted wetlands were rated using what is now an outdated version of the wetland rating system. The credit-debit analysis Millennium submitted to Ecology on September 20, 2017, did not include scoring forms for any of the wetlands to be impacted. Without these forms, Ecology cannot evaluate the credit-debit analysis. Millennium has not provided a complete analysis to Ecology, thereby failing to demonstrate that the proposed mitigation would be adequate.

4. **Hydrologic and Soil Investigations.** The conceptual mitigation plan states that: "The nature of this surface water will be further investigated as part of planned hydrologic investigations to support final Site design." The plan further states that "hydrologic data are being collected." The plan also states that: "Additional, site-specific soil investigations are planned at the Mitigation Site to inform final mitigation design." Millennium has not provided the results of these hydrologic and soil analyses to Ecology. In its September 20, 2017, responses to Ecology's questions about the proposed mitigation site, Millennium stated that it is still in the process of collecting hydrologic and soil data and that it will submit a technical report once compilation of the data has been completed. Because Millennium has not submitted detailed information supported by data about the hydrologic and soil conditions at the proposed mitigation site, Millennium has not demonstrated that the site is suitable and can provide adequate mitigation.

B. Stormwater and Wastewater

Sufficiently detailed information and analyses necessary to understand, evaluate, and condition wastewater and stormwater discharges are needed to assure compliance with Washington State water quality. Without complete information such as that noted below, Ecology does not have reasonable assurance that the Project will meet water quality standards.

1. **Wastewater Characterization.** Wastewater characterization information is necessary for Ecology to evaluate the impact of discharges from the Project on the receiving water (surface water, ground water, and sediments) and to determine the need for effluent limits, monitoring requirements, and other special conditions to ensure that the Project will meet state water quality standards. This information is typically required in an application for a National Pollutant Discharge Elimination System (NPDES) permit (WAC 173-220-040 and 40 C.F.R. § 122.21).

In response to Ecology's requests, Millennium submitted additional information on September 20, 2017. However, the submittals still do not provide detailed information to adequately characterize process wastewater and stormwater that will be generated at the site, including:

- Sources of wastewater (points of generation).
- Estimated wastewater volumes.
- Estimated pollutant concentrations.

2. **All Known, Available and Reasonable Methods of Prevention, Control and Treatment (AKART) and Engineering Reports.** AKART is required by three state statutes dealing with water pollution and water resources (Chapter 90.48 RCW, Chapter 90.52 RCW, and Chapter 90.54 RCW) and the state NPDES regulations that implement these laws (WAC 173-220). These laws and regulations state that in order to ensure the purity of all waters of the state and regardless of the quality of the waters of the state, discharges must be treated with all known, available, and reasonable methods of prevention, control, and treatment.

Chapter 173-240 WAC requires submittal of engineering reports and plans for new and modified industrial wastewater conveyance, discharge, and treatment facilities. Industrial wastewater includes contaminated stormwater. Ecology uses the information in the engineering report to determine whether AKART is being met and to ensure that effluent from the Project will meet applicable effluent limitations to protect aquatic life.

Millennium's submittals, including the submittal of September 20, 2017, did not provide sufficient information to determine whether AKART will be met for both process wastewater and stormwater generated from the Project. The following is a list of information deficiencies:

- The current AKART analysis does not address the wastewater generated during construction and operation of the Project (i.e., the current AKART analysis addresses only existing Millennium operations).
- Specific best management practices (BMPs) for stormwater management on site, at and near rail lines, and for rail car unloading were not provided.
- Engineering reports were not submitted for the following:

- Stormwater collection and treatment facilities (including dock and trestle).
- The new wastewater treatment system.
- Any proposed modifications to the existing wastewater treatment system.
- Changes to hydraulic loading through the existing wastewater treatment system and through the conveyance and outfall structures.

3. **Mixing Zone.** Ecology may authorize a mixing zone to meet water quality criteria once it has been determined that AKART has been met (WAC 173-201A-400). Water quality criteria must be met at the edge of a mixing zone boundary. Ecology uses the dilution factors determined for each mixing zone in analyzing the potential for violation of water quality standards and to derive effluent limitations as necessary.

Millennium's submittals did not provide updated mixing zone information, which Ecology would need in order to determine potential to violate water quality standards. Missing information includes a new mixing zone analysis to evaluate changes in dilution factors due to changes in the final effluent at Outfall 002A and updated receiving water information.

4. **Construction.** Contaminated stormwater and ground water will be generated during construction of the Project. Ecology needs sufficient information to evaluate the impact of construction activities and the discharges from these activities on waters of the state. This is information that is necessary for reasonable assurance and to demonstrate AKART as discussed above.

Millennium's submittals provided very little information concerning the unique construction of the Project. Missing information includes the following:

- How compaction of soils will potentially impact groundwater and surface water.
- Specific construction BMPs.
- Construction stormwater and groundwater characterization information, including estimated volumes and pollutant concentrations.
- Whether construction wastewater will be adequately treated.

5. **Antidegradation.** The Clean Water Act requires that state water quality standards protect existing uses by establishing the maximum levels of pollutants allowed in state waters. The antidegradation process helps prevent unnecessary lowering of water quality. Washington State's antidegradation policy follows the federal regulation guidance and has three tiers of protection. Tier II (WAC 173-201A-320) is used to ensure that waters of a higher quality than water quality criteria are not degraded unless such lowering of water quality is necessary and in the overriding public interest. A Tier

II analysis must be conducted for new or expanded actions when the resulting action has the potential to cause a measurable change in the physical, chemical, or biological quality of a water body.

Millennium's submittals did not include a detailed Tier II analysis for process wastewater and stormwater to determine whether the Project has the potential to cause measurable degradation at the edge of the chronic mixing zone.

Ecology notified Millennium during various meetings, conference calls, and site visits during 2017 (June 8, June 19, June 28, August 16, August 29, and September 8, 2017) that detailed information regarding the stormwater and process wastewater would need to be submitted to Ecology in order to provide reasonable assurance that the discharges from the Project would meet state water quality standards.

C. Water Rights

The Millennium proposal includes operational descriptions for ongoing reuse of stormwater for industrial dust control. If stormwater is collected and reused for a beneficial use, a water right permit would be required in accordance with Chapter 90.03 RCW.

The Millennium property formerly supported the Reynolds aluminum smelter. During the operations as an aluminum smelter, Reynolds had three water right claims and six water right certificates with a combined total annual quantity (Qa) of 31,367 acre-feet per year at a withdrawal rate of 23,150 gallons per minute (Qi). The Reynolds smelter closed in 2000.

These claims and certificates are now owned by Northwest Alloys, who purchased the property from Reynolds in the early 2000s. No information has been provided to Ecology that documents continued beneficial use of water since about the early 2000s.

In December 2016, Ecology met with Millennium and requested records and other relevant information to document what the current and recent water uses have been on the Millennium property. To date, Millennium has not provided this information. If these water rights have been partially or fully relinquished, Millennium would need to apply for and obtain the necessary water rights to legally put water to beneficial use at the Project site for its proposed operations.

As of September 26, 2017, no information has been provided by Millennium to Ecology in order to quantify the extent and validity (or continued beneficial use) of the existing water rights that are appurtenant to the property, and no water right application(s) have been received by Ecology requesting any new use of water or change in beneficial use(s) of water.

Without a water right, Ecology does not have reasonable assurance that Millennium will be able to legally carry out its proposal.

D. Toxics Cleanup

The proposed location for the Project is the former Reynolds Metals aluminum smelter site. This is a Model Toxics Control Act cleanup site. The principal contaminants are fluoride, polycyclic aromatic hydrocarbons (PAHs), cyanide, and total petroleum hydrocarbons (TPHs). Millennium and Northwest Alloys (a subsidiary of Alcoa) are potentially liable persons (PLPs) for the site. Alcoa owns the property. Millennium leases the property from Alcoa. The PLPs have been working to define the extent of the contamination at the site and evaluate the potential cleanup alternatives. Public notice of a draft cleanup action plan outlining the proposed cleanup was issued in March 2016. Ecology has been working with the PLPs to provide additional sampling along the Columbia River to address comments received on the draft cleanup action plan. To date, the cleanup action plan and consent decree have not been finalized.

Portions of the Project's infrastructure are located on contaminated soil and a historic landfill at the site. The majority of the site contains contaminated ground water. Proposed construction and operation of the Project would likely alter the migration of contaminated ground water at the site. The ballast that will be used during construction could force ground water to the surface with potential for discharge to the Columbia River.

Millennium's submittals do not provide sufficient information to evaluate the impact of the potential discharge of contaminated stormwater and ground water during the construction and operation of the Project. As a result, Millennium failed to demonstrate reasonable assurance that the Project will meet water quality standards.

YOUR RIGHT TO APPEAL

You have a right to appeal this Denial Order to the Pollution Control Hearings Board (PCHB) within 30 days of the date of receipt of this Denial Order. The appeal process is governed by Chapter 43.21B RCW and Chapter 371-08 WAC. "Date of receipt" is defined in RCW 43.21B.001(2).

To appeal you must do all of the following within 30 days of the date of receipt of this Order:

- File your appeal and a copy of this Denial Order with the PCHB (see addresses below). Filing means actual receipt by the PCHB during regular business hours.
- Serve a copy of your appeal and this Denial Order on Ecology in paper form—by mail or in person. (See addresses below.) E-mail is not accepted.

You must also comply with other applicable requirements in Chapter 43.21B RCW and Chapter 371-08 WAC.

ADDRESS AND LOCATION INFORMATION

Street Addresses	Mailing Addresses
Department of Ecology Attn: Appeals Processing Desk 300 Desmond Drive SE Lacey, WA 98503 **Pollution Control Hearings Board** 1111 Israel RD SW, Suite 301 Tumwater, WA 98501	**Department of Ecology** Attn: Appeals Processing Desk PO Box 47608 Olympia, WA 98504-7608 **Pollution Control Hearings Board** PO Box 40903 Olympia, WA 98504-0903

Maia D Bellon, Director
Department of Ecology

Date 9/26/17

Senator CARPER. A third from the American Rivers Connect the U.S. to the letter dated November 18th, 2019.

Senator BARRASSO. Without objection.

[The referenced information follows:]

American Rivers
RIVERS CONNECT US®

November 18, 2019

The Honorable John Barrasso
Chairman
Committee on Environment and Public Works
United States Senate
Washington, D.C. 20510

The Honorable Thomas R. Carper
Ranking Member
Committee on Environment and Public Works
United States Senate
Washington, D.C. 20510

Dear Chairman Barrasso and Ranking Member Carper:

On behalf of our 275,000 members and supporters nationwide, we write in opposition to S. 1087, the "Water Quality Certification Improvement Act of 2019" and any other efforts to undercut states' authorities under section 401 of the Clean Water Act (CWA).

Section 401 of the CWA grants states and tribal authorities the ability to ensure that federal permits and licenses comply with state water quality standards and state law. Section 401 requires that permit applicants obtain state or tribal certification that the projects have met state and/or tribal water quality conditions, ensuring the project's compliance with applicable federal, state, and tribal law. This CWA provision gives the states a key role in implementing water quality standards for direct discharges and non-point source pollution. In fact, the United States Supreme Court in 2006 unanimously ruled that "[s]tate certifications under [Section] 401 are essential...to preserve state authority to address the broad range of pollution." We feel this legislation undermines the ability of states and tribal authorities to ensure that proposed projects comply with those state and tribal water quality standards.

The Clean Water Act establishes a special partnership for implementation of the law where Congress specifically designated state and tribal authorities as co-

regulators that recognize state and tribal interests and authority. As proposed, S. 1087 overturns decades of deference to state and tribal authority by diminishing their ability to manage or protect water quality, and in some cases quantity, within their boundaries.

S. 1087 would lead to an overly narrow reading of section 401 that would deprive the states of the ability to maintain those beneficial uses the Clean Water Act was designed to protect. Federal agencies would be able to override state and tribal concerns and permit some activities and projects that would directly conflict with the states' and tribal authorities' efforts and investments in pollution control programs, fish recovery programs, temperature control mechanisms, minimum-flow requirements, and other essential activities. Because the states have been authorized to implement Clean Water Act programs, it only makes sense to give them the power to ensure a federally permitted activity does not impair state waters, in accordance with the states' standards. Instead, S. 1087 subordinates the expertise of state and tribal regulators and the interests of state and tribal governments to the interests of the federal government. For example, when certifying a federal permit, some states may find it necessary to condition the certification on meeting state buffer requirements to ensure state water quality standards are not impacted. S. 1087 would remove that ability from the state. Because S. 1087 limits the state analysis to discharges, it could be interpreted to prevent a state from considering the impact of a project or activity on increased impervious surfaces and associated impacts to water quality.

In addition, S. 1087 unreasonably limits timing on states during the 401 certification process. By requiring states and tribal authorities to grant or deny a request for certification within a limited period of time, the state agencies may be forced to make a decision before they have all the relevant information or may rush their analysis in order to meet a deadline. Also, by limiting state agencies to 90 days in which to identify all necessary materials, information, or deficiencies in an application for certification, S. 1087 may force the states to make decisions without all of the needed information. This creates a dynamic where unless every step of the process proceeds seamlessly, agencies are faced with the impossible decision to either exercise their authority without necessary information (which exposes them to legal liability) or to fail to meet the schedule. This change will constrain federal, state, and tribal agencies use of their independent authorities and rush decision making, potentially making it more difficult to protect water

quality, recover threatened and endangered species, and manage tribal-trust resources and public lands. Alternatively, states, constrained by the proposed time limitations, may deny certifications more often because they won't have enough information to rely on for decision making. Last, federal agencies and developers may be incentivized to withhold information in order to get a decision within a certain period of time.

This proposed legislation would also impact a state's role in hydropower relicensing. Because hydropower licenses are issued for up to 50 years, many hydropower facilities that are coming up for relicensing now were first constructed before virtually all modern environmental laws were in place. It is during relicensing proceedings that the public gets the opportunity to ensure that dam owners make the necessary changes to comply with modern laws. The opportunity to mitigate for the damage to the environment, while still providing reliable electricity, only arises once in a generation or two. S. 1087 would significantly curtail state and tribal authority to ensure the licenses include conditions that protect state water quality standards and beneficial uses.

A vital component of the CWA's system of cooperative federalism is state and tribal authority to certify and condition federal permits of discharges into waters of the United States under Section 401. This authority has helped ensure that activities associated with federally permitted discharges will not impair state or tribal water quality. S. 1087 does not reflect the historic relationship between states, tribes, and the federal government with respect to managing water, and instead it upends the careful balance between the states, tribes, and the federal government inherent in the Clean Water Act. By seizing power from states and tribes, S. 1087 puts the interests of power companies, pipelines, railroads, and other developers ahead of the interests of the states and tribes and of the public that wants to enjoy access to clean water.

We urge the Committee to reject S. 1087.

Sincerely,

/s/
Ted Illston
Senior Director, Policy and Government Relations

Senator CARPER. A fourth from the Appalachian Trail Conservancy dated November 19th this year.

[The referenced information follows:]

APPALACHIAN TRAIL CONSERVANCY®

November 19, 2019

Senator John Barrasso
Chairman, U.S. Senate Committee on Environment and Public Works
410 Dirksen Senate Office Building
Washington D.C. 20510

Senator Tom Carper
Ranking Member, U.S. Senate Committee on Environment and Public Works
465 Dirksen Senate Office Building
Washington D.C. 20510

Dear Chairman Barrasso and Ranking Member Carper,

On behalf of the Appalachian Trail Conservancy (ATC), our members and volunteers, and the more than 3 million visitors the Trail receives annually, I write to express our opposition to S. 1087, the Water Quality Certification Improvement Act of 2019 as well as our opposition to the currently proposed rule regarding Clean Water Act (CWA) §401 under consideration at the Environmental Protection Agency (EPA). Both the legislation and proposed rule violate the central tenets of cooperative federalism that provide the basis of §401 and, if law, would severely hamper ATC's state cooperative management partners in their ability to ensure proper water quality standards are met to oversee natural resources for health, recreation, and conservation. In fact, in individual or group submissions, 13 of the 14 Appalachian Trail states are on the record at EPA opposing the currently proposed rule.

The Appalachian National Scenic Trail (A.T. or Trail) is the longest hiking-only footpath in the world, measuring roughly 2,190 horizontal miles in length. The Trail travels through 14 states along the crests and valleys of the Appalachian Mountain Range, from its southern terminus at Springer Mountain, Georgia, to the northern terminus at Katahdin, Maine. Radiating outwards from the Trail is the A.T. Landscape, which connects rural communities and working farms and forests while squeezing through rapidly developing regions and providing the foundation for world-class outdoor recreation and tourism opportunities. When evaluating everything from how filling an adjacent wetland could impact habitat and drinking water for Trail users and communities along the Trail to how the construction of a natural gas pipeline could alter the view from our trust resource, the A.T., states employ their authority under §401 to ensure a thorough consideration of potential impacts and to mitigate against them when necessary.

More than 3 million people visit the Trail every year and over 3,000 people attempt to "thru-hike" the entire footpath in a single year. People from across the globe are drawn to the A.T. for a variety of reasons, such as connecting with nature, exploring the cultural resources of the Appalachian Mountain range, meeting new people or deepening old

ATC HEADQUARTERS
799 Washington Street, P.O. Box 807, Harpers Ferry, WV 25425-0807 | Phone: 304.535.6331 | Fax: 304.535.2667 | www.appalachiantrail.org

friendships, and accessing any of the almost 100 parcels of state and federal public lands connected by the A.T.

ATC's first and foremost responsibility is to ensure the proper management and maintenance of the A.T., which is possible only through a cooperative management system involving 31 maintaining clubs, 6,000 volunteers, and federal and state land management agencies. Section 401 is a critical tool used by states and authorized tribes to ensure that local expertise is included in federal permits/licenses and that local managers are not required to mitigate against the damage that federal authorities may inflict by not considering the interests of those who manage the day-to-day realities of our dynamic ecosystems and communities. In arguing for the necessity of S. 1087 and the proposed rule, no justification has been shown for the complete upending that would occur to the cooperative management system outlined by the Act. For these reasons and because we see firsthand every day the level of professionalism and experience of our state cooperative partners, we oppose the proposed legislation and rule.

The legislation and proposed rule would significantly hamper the cooperative federal management system dictated by Congress in §401 and the issuance of water quality certifications (WQCs) in five primary ways: (1) restricting the information states and authorized tribes may consider before issuing a decision on a §401 application; (2) limiting the amount of time states and authorized tribes have to issue scientifically based and legally defensible conditions; (3) infringing on state and tribal authority to enforce conditions; (4) preventing the inclusion of appropriate state or tribal law; and (5) extra-statutorily allowing EPA, the Federal Energy Regulatory Commission (FERC) and the Army Corps of Engineers (ACE) to veto conditions placed within a certification.

Because ATC respects and values the perspectives of our cooperative management partners to an extent that is not reflected in either S. 1087 or the proposed rule, and because we want to make sure that our states' views are represented, we are including some of their comments in this letter. As the State of Tennessee's Department of Environment and Conservation (TN DEC) explained, "[t]he structure and substance of these [401] processes and procedures were not created in a vacuum-they were developed through an extensive process that involved environmental regulatory personnel, environmental professionals, legal professionals, and various other stakeholders."

Lack of Justification

Neither ahead of the initial introduction of the predecessor legislation to S. 1087 nor within the preamble to the proposed rule published at the direction of the President in Executive Order 13868, "Promoting Energy Infrastructure and Economic Growth," has there been any explanation as to why a wholesale alteration of the §401 process is required or how the critical needs of state and authorized tribal regulators will be addressed. As a matter of fact, the Executive Order that required the composition of the proposed rule was focused not on improving water quality or healthy ecosystems—the Congressionally declared purposes of the Clean Water Act—rather; the directives in the Executive Order were explicitly related to addressing concerns from energy infrastructure

developers that it wasn't easy enough for them to obtain the kind of environmental review that would enable them to build pipelines based on their personal preferences and on their preferred timelines.

In discussing the lack of justification for the proposed rule, the New England Interstate Water Pollution Control Commission (NEIWPCC) cited a lack of "...any thorough analysis that gives cause to suggest the proposed changes will achieve the E.O.'s objectives, nor are we aware of any analysis performed on how the Proposed Rule will protect our nation's water resources according to the objective of the CWA, 'to restore and maintain the chemical, physical, and biological integrity of the Nation's waters' (CWA §101(a)." Echoing this sentiment, the State of New York, through its Department of Environmental Quality (NY DEQ), submitted to EPA that, "[r]egardless of the reasons behind the [p]roposal, EPA seeks to overturn its own longstanding legal interpretations, as well as those of the U.S. Supreme Court. The preamble for the [p]roposal is filled with creative attempts to reinterpret decades of successful implementation of Section 401 by EPA itself, other agencies, and the courts. While EPA deserves credit for its creativity, these efforts will ultimately fail."

Restricting Information

The proposed rule and S. 1087 approach the evaluation of an application for a water quality certification from the perspective that projects exist in isolation. This is obviously and demonstrably false, as ecosystems are complex and waterways connect mountains to the oceans and everything in between. The presumption that the CWA's declaration that states and authorized tribes may consider "any appropriate" law while processing an application recognizes the reality that the Act was written to address certain federally recognized needs, but that states and tribes must also be able to manage resources for purposes not addressed by the Act. As the State of West Virginia Department of Environmental Protection (WV DEP) wrote, "[t]he WVDEP's scope of review for a certification may extend beyond a point source discharge to comply with state law and consider the proposed activities impact on water resources, fish and wildlife, recreation, critical habitats, wetlands, and other natural resources."

WV DEP further informed EPA that "[t]hrough the implementation of the proposed rule, state rights to protect resources from degradation and to plan the development and use of land and water resources would be reduced" and that "[i]f the intent of this proposed rule is to exclude requirements of state law that are not EPA-approved, then additional state permitting may be required of the applicant which would not meet the intent of the proposed rule to increase the predictability or timeliness of certification." The Commonwealth of Massachusetts, through its Department of Environmental Protection (MA DEP), concurred, writing EPA that as, "[a] direct consequence of this new approach to state §401 certification, states would need to consider separating state permits programs from their federal counterpart to preserve state law authorities and carry out state agency responsibilities."

Furthermore, Massachusetts explained that development in one corner of the ecosystem could have domino effects downstream that must be considered, by writing, "[i]n the context of FERC licenses and Corps permits, states would no longer focus their review on the effects of the discharge on the *aquatic ecosystem* as a whole, and, for example, states would be prohibiting from imposing conditions in §401 certifications to protect groundwater, establish construction season restrictions meant to prevent landslides, soil erosion, or impairment of riparian habitat, or establish conditions requiring maintenance of buffer zones, revegetation, protection of intermittent streams, or compensatory mitigation under state law."

The State of North Carolina Department of Environmental Protection (NC DEP) highlighted that the process under which §401 certifications are issued is already operating under less-than-ideal information sharing realities. It wrote that, "EPA should also consider [f]ederal program requirements that require submittal of a 401 application well before an applicant has the necessary information for a 401 application. For example, FERC requires applicants for a 'Certificate of Public Convenience and Necessity' ('Certificate') to concurrently file an application for a state 401 certification. [18 CFR 157.13]. The State needs information that will be contained in the FERC environmental document, but that document is not available until later in the process. Preferably an applicant should be able to apply for the 401 water quality certification after FERC has released the draft EIS." The proposed rule and S. 1087 would, of course, prevent the draft EIS from being considered by a state or authorized tribe as they review an application under §401.

Limiting Time

West Virginia DEP underscored that many delays in review are the result of applicants failing to provide sufficient information in their applications and that, under the proposed rule or S. 1087, "[i]n cases where permitttees egregiously disregard agency requests for information, a denial of a certification may be required due to the inadequate information to determine effects of the proposed activity on water quality or designated uses." The TN DECalso wrote that "[t]he definition of a 'certification request' does not include all of the information required to constitute a complete application under Tennessee law, and it is likely that the same is true for other states as well."

Tennessee DEC further expounded, "EPA's proposal to establish a process that initiates certification timeframes upon receipt of an incomplete application potentially would force TDEC to deny certification request in order to comply with newly proposed certification timelines, whereas currently TDEC is able to work with the applicant to request additional information necessary to make a determination of compliance with state water quality standards...Initiating a Section 401 certification based on an incomplete application or project scope may also have negative impacts on the public's ability to fully understand the project and provide meaningful input as contemplated by Section 401(a)(1) of the CWA."

Constricting Enforcement Authority

Since the enactment of the CWA, local laws have been incorporated into federal permits and objections to those permits (issued under state water quality requirements) have been heard in the appropriate state or tribal court. S. 1087 and the proposed rule both pursue a change of venue and put the burden on those issuing a water quality certification to defend the regulatory decisions that uphold statutory requirements for environmental conservation. In questioning the removal of authority from states to include local water quality conditions and enforce them in state court, the Commonwealth of Pennsylvania Department of Environmental Protection (PA DEP) informed EPA that, "EPA's [p]roposed [r]ule conflicts with the intent of the Clean Water Act, diminishes Pennsylvania's rights to ensure that water quality standards are maintained, and threatens the health of Pennsylvania's waters by circumventing the Commonwealth's longstanding protections under state law."

Illegal Federal Veto of Conditions

The potential of duplication of efforts, or of not granting the states or authorized tribes their professional due may be unavoidable under the proposed rule/S. 1087. The State of Connecticut, through its Department of Energy and Environmental Protection (CT DEEP) elucidated that EPA currently accepts state analysis for the expert product it is, writing "...a hydraulic model is part of the application package where the current practice in EPA Region 1 is to defer the analysis of complex hydraulic/hydrologic modeling to the state. Reviewing intricate hydraulic modeling can be time consuming to perform and should not be circumvented." Second-guessing the states and authorized tribes and potentially requiring unnecessary federal level review would be time-consuming and ultimately unproductive.

In responding to the extra-statutory power EPA grants to itself and its sibling agencies in the proposed rule, the State of Maryland's Department of the Environment (MDE) wrote, "[i]n particular, by altering the scope of CWA Section 401 certification review, and granting authority to federal permitting agencies to review and effectively 'approve' or 'disapprove' state-issued certifications, the Proposed Rule has the effect of transferring decision-making authority from the states to the federal permitting agencies. Such a fundamental change could only be made by Congress."

Agreeing, NEIWPCC wrote, "[t]his unilateral veto-power given to the federal agency is an infringement on the statutory authority granted to states and is unfitting with cooperative federalism and the co-regulatory design of the CWA." Moreover, "[s]tates are the one and only entity who can evaluate their resources and capacity for certification review, and substituting federal judgement over that of states goes against the state authority established in the CWA."

For almost 50 years, §401 of the Clean Water Act has enabled states and authorized tribes to substantially participate in the regulation of federal projects authorized by the EPA,

ACE, and FERC. By the plain language of the Act, without the approval of the impacted states and authorized tribes, as reflected in their issuance of a §401 WQCs, the projects cannot occur. The Act did not create this authority; the right of states and tribal nations to manage their own resources is inherent. Section 401 simply directed the time and place when those local laws would be placed into the federal permit/license. The current efforts to undercut states and authorized tribes are misguided and do not reflect a genuine understanding of how the certification process works and what the aims of the authorities issuing WQCs—promoting clean water for consumption and recreation—are.

In order to serve our essential conservation mission of protecting the Appalachian National Scenic Trail and the broader, vulnerable A.T. Landscape forever, for all, and in solidarity with our cooperative management partners, who have submitted vigorous objections to the goals of and changes wrought by the proposed rule (and, by extension, S. 1087), we strongly object to the Committee's consideration of S. 1087. We further urge the Committee to cease all consideration of the bill and instead work with ATC and our partners to craft legislation that would assist states and authorized tribes in conserving their land and water resources to provide for the public good.

Sincerely,

Brendan Mysliwiec
Director of Federal Policy and Legislation
Appalachian Trail Conservancy

CC: Members, U.S. Senate on Environmental and Public Works

Senator CARPER. And the last thing I want to say is, I think all of us are guided by the Golden Rule, whether we think about it or not. We should treat one another the same. I always try to put myself in the shoes of other people and say, how would I want to be treated if I were in their case, right?

I know how important the economy of my State is to me, and I am sure the same is true for our Chairman.

I live in a little State, we are the 49th largest State, so we are a small State.

My State is sinking, and the seas around us are rising. It is, as you might imagine, a huge concern for us.

There's widespread belief that one of the reasons why it has happening—I am a native of West Virginia; my dad was a coal miner for a while. My neighbors were coal miners, so we have to understand what it has like to be in the fossil fuel industry, if you will.

But I would just ask that we try to put ourselves in your shoes as you attempt to govern your States, but I want you to put yourself in our shoes. When I was Governor of Delaware, I could shut down my State's economy, literally get every car or vehicle off the road, shut down every business, we would still have been out of compliance for clean air.

So just keep that in mind as we go forward, and again, thank you all for being here.

Senator BARRASSO. Thank you, Senator Carper, and with that, thank you again for being here; the hearing is adjourned.

[Whereupon, at 11:49 a.m., the hearing was concluded.]

[Additional material submitted for the record follows:]

United States Senate

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS
WASHINGTON, DC 20510-6175

October 21, 2019

The Honorable Andrew R. Wheeler
Administrator
U.S. Environmental Protection Agency (EPA)
1200 Pennsylvania Avenue N.W.
Washington, DC 20460

Dear Administrator Wheeler,

We are writing to express our strong support for EPA's commitment to improve implementation of Section 401 of the Clean Water Act. Just over a year ago, we wrote the attached letter asking you to withdraw draft, inaccurate guidance issued in 2010 to implement Section 401. We also asked that "EPA – as the lead federal agency – work with other federal agencies to determine what government-wide direction is needed, including the need for new clarifying guidance or regulations." We appreciate your and President Trump's commitment to prioritizing our request for Section 401 reform under Executive Order 13868, the April 2019 Executive Order titled "Promoting Energy Infrastructure and Economic Growth."

Modernization of the Clean Water Act Section 401 water quality certification process remains a top priority for us. The regulations that you propose to revise are forty-eight years old. As you have noted, the 1971 regulations predate Section 401 itself, which was created through the 1972 amendments to the Federal Water Pollution Control Act of 1948. The long unaddressed need for a rulemaking has only grown more acute since our October 2018 letter. Coastal states opposed to American energy production and use at home and abroad continue to weaponize Section 401. They attempt to wield Section 401 to block large energy projects from moving forward.

Coastal states have denied water quality certifications under Section 401 that prevent the transmission of natural gas and the export of American coal and liquefied natural gas. These states' actions hurt other states' sovereign interests. As state officials have observed, "the actions of individual state actors are disruptions to interstate commerce and negate the intent of providing the consistent and reliable permitting process envisioned by the Clean Water Act."[1]

The economic harm caused by crippling energy projects is real. As the Wall Street Journal reported in July, utilities around New York City will not link up new customers because the State of New York is blocking new natural gas pipelines.[2] As the Journal reported, "With limited

[1] Letter from the Attorneys General of Louisiana, South Carolina, Alabama, Texas, Montana, West Virginia, and Nebraska to Acting Administrator Wheeler (February 26, 2019), https://www.regulations.gov/document?D=EPA-HQ-OW-2018-0855-0011

[2] Stephanie Yang & Ryan Dezember, "The U.S. Is Overflowing with Natural Gas. Not Everyone Can Get It," Wall Street Journal (July 8, 2019), https://www.wsj.com/articles/the-u-s-is-overflowing-with-natural-gas-not-everyone-can-get-it-11562518355.

pipelines to smooth the distribution of gas around the country, price spikes have become wild. In 2018, natural gas prices in New York City surged as high as $175 during a snowstorm that spurred record heating demand. A week later, they returned to about $3."

Continued abuses of Section 401 will hurt not only American energy consumers, but also hardworking Americans and communities whose livelihoods depend on energy production. The Environment and Public Works Committee held a hearing on Section 401 in August 2018. Brent Booker, Secretary-Treasurer of North America's Building Trades Unions, testified about the Constitution Pipeline in New York— just one of the pipelines for which New York has denied a Section 401 certification. He stated:

> [A] safe, modern, and affordable solution, the Constitution pipeline, was delayed from being built after already receiving [Federal Energy Regulatory Commission] approval. This permit denial is still delaying about 2,400 direct and indirect jobs from the pipeline construction generating $130 million in labor income and economic activity for the region. The decision continues to cost local governments approximately $13 million in annual property tax revenue.

CJ Stewart, a Crow Tribal member and Board Member and Co-Founder of the National Tribal Energy Association, testified about the State of Washington's denial of Section 401 certification for a coal export terminal. He testified:

> The U.S. holds more of the world's coal reserves than any other country, and the coal mined by the Crow Nation is preferred by high efficiency, low emission power plants that are in operation and being built around the world. However, even though our coal resources provide a critical component of U.S. export trade, our ability to get our coal to fast-growing Asian markets is being hindered by states on the West Coast who continue to refuse to grant needed approvals to build state of the art export facilities for political – not water quality – reasons.

We stand ready to support you as your agency moves forward in this rulemaking. This work is critical to America's prosperity and to our standing as an energy leader in the world. Global energy usage is going to grow across all sectors – renewables, petroleum, natural gas, and coal – between now and 2050.[3] Section 401 cannot continue to be used to block America's ability to deliver on that demand. Section 401 of the Clean Water Act must be implemented as Congress intended – a careful scalpel to protect water quality, not a bludgeon for select states to kill critically important projects.

[3] Energy Information Administration (EIA), "EIA projects nearly 50% increase in world energy usage by 2050, led by growth in Asia" (Sept. 24, 2019), https://www.eia.gov/todayinenergy/detail.php?id=41433.

Sincerely,

John Barrasso, M.D.
Chairman
Committee on Environment & Public Works

Shelley Moore Capito
United States Senator

Michael B. Enzi
United States Senator

James M. Inhofe
United States Senator

Kevin Cramer
United States Senator

Steve Daines
United States Senator

Enclosures

United States Senate

WASHINGTON, DC 20510

October 4, 2018

Andrew R. Wheeler
Acting Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Dear Acting Administrator Wheeler:

We are writing to request your review of the federal government's implementation of Clean Water Act Section 401 to ensure it is consistent with the statute. We ask that you work with other federal agencies to determine whether new clarifying guidance or regulations are needed in light of recent abuses of the Section 401 process by certain states.

In the last few years, a troubling trend directed at fossil energy projects has arisen. A select number of states have hijacked Section 401 to delay or block the development of natural gas pipelines and a coal export terminal. While the focus of these abuses today is fossil energy, the approach could be used to target any type of project that is disfavored politically.

To address this concern, we introduced S. 3303, the Water Quality Certification Improvement Act of 2018. This bill clarifies appropriate considerations and processes to evaluate water quality impacts under Section 401. Recent obstruction of energy infrastructure projects has directly threatened national security by forcing reliance on foreign energy and increased air emissions.[1] This obstruction has hurt American workers,[2] states,[3] and tribes.[4]

We are firmly committed to states' and tribes' central role in protecting water resources, as we have maintained in other contexts.[5] In the few instances mentioned above, Section 401 is currently being used inappropriately to "fight" projects rather than protect water quality.[6] As the primary agency responsible for implementation of the Clean Water Act,[7] the Environmental Protection Agency (EPA) plays a critical role in ensuring that the statute is fairly

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[1] Editorial, *Why You'll Pay for Beacon Hill's Pipeline Folly*, BOSTON GLOBE, Apr. 22, 2018.

[2] *Hearing to Examine Implementation of Clean Water Act Section 401 and S. 3303, the Water Quality Certification Improvement Act of 2018: Hearing Before the S. Comm. on Env't & Pub. Works*, 115th Cong. (2018) [hereinafter *§401 Hearing*] (statement of Brent Booker, Secretary-Treasurer, North America's Building Trades Unions).

[3] Tim Fox, Attorney General of Montana, Opinion, *Washington State Should Stop Blocking Planned Coal Export Terminal*, N.Y. TIMES, June 21, 2018.

[4] *§401 Hearing*, *supra* note 2 (statement of CJ Stewart, Board Director, National Tribal Energy Association).

[5] *The Appropriate Role of States and the Federal Government in Protecting Groundwater: Hearing Before the S. Comm. on Env't & Pub. Works*, 115th Cong. (2018).

[6] *See* Tom Johnson, *Move in Congress to Weaken Clean Water Act Could Have Impact in New Jersey*, NJ SPOTLIGHT, Aug. 16, 2018 ("'If this bill happens, it will make it extremely difficult to fight these dangerous projects,' said Jeff Tittel, director of the New Jersey Sierra Club. 'It (the Section 401 review) is probably the most effective tool we have to fight these projects.'"); *see also §401 Hearing*, *supra* note 2 (letter of Millennium Bulk Terminals-Longview LLC submitted to the record).

[7] 33 U.S.C. §1251(d) ("Except as otherwise expressly provided in this chapter, the Administrator of the Environmental Protection Agency … shall administer this chapter.").

and uniformly applied. To our knowledge, the most recent EPA document regarding Section 401 is a 2010 interim "handbook" issued by the prior administration. EPA did not ask for public comment on the handbook, and it contains clear misstatements of law. For example, the handbook suggests that a state's "reasonable period" of time to act on a request for a water quality certification begins to run when an application is complete.[8] This is incorrect. That period begins to run when the state receives the application.[9]

We ask that you take immediate steps to review this handbook and other EPA materials. We also request that that EPA – as the lead federal agency – work with other federal agencies to determine what government-wide direction is needed, including the need for new clarifying guidance or regulations. All parties must have a clear understanding of the appropriate scope of water quality certification decisions. The federal permits and licenses that trigger the water quality certification process are often issued by other federal agencies, including the Federal Energy Regulatory Commission and U.S. Army Corps of Engineers. EPA must ensure that these agencies have consistent, coordinated direction.

Sincerely,

John Barrasso, M.D.
Chairman
Committee on Environment & Public Works

James M. Inhofe
U.S. Senator

Shelley Moore Capito
U.S. Senator

Steve Daines
U.S. Senator

Michael B. Enzi
U.S. Senator

Enclosures

[8] EPA, *Clean Water Act Section 401 Water Quality Certification: A Water Quality Protection Tool for States and Tribes* at 11 (2010) ("The amount of time allowed for action on a certification application is determined by the Federal agency issuing the license or permit, while the certifying agency determines what constitutes a 'complete application' that starts the timeframe clock.").

[9] *NY State Dep't of Envt'l Conservation v. FERC*, 884 F.3d 450, 455-56 (2d Cir. 2018).

BRENT BOOKER
SECRETARY - TREASURER
NORTH AMERICA'S BUILDING TRADES UNIONS

SENATE COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS
TESTIMONY

August 16, 2018

Good Morning and thank you Senator Barrasso and Senator Carper for your leadership and continued efforts to address permitting reform. As Secretary-Treasurer of North America's Building Trades Unions, and on behalf of the three million skilled construction workers I represent, thank you for allowing me to share with you the impacts of project delays on the hard-working men and women who build and maintain America's energy, water, and transportation infrastructure.

NABTU is dedicated to creating economic security and employment opportunities for North American construction workers by safeguarding wage and benefits standards, promoting responsible private capital investments, investing in renown apprenticeship and training, and creating pathways to the middle class for women, communities of color and military veterans in the construction industry.

Because of these efforts, and others, collectively amongst all 14 NABTU affiliates, more than one billion dollars is spent annually on apprenticeship training at 1,600 domestic training centers. And, we now boast 135 apprenticeship programs to ready students for the academic and real-world challenges of being a union apprentice.

North America's Building Trades Unions support responsible regulations that protect the environment, public health and worker safety. We believe they are critical to responsible infrastructure development that lasts for decades and allows for future generations to use these invaluable assets. What is concerning, however, is the tactic of project opponents using a constant stream of endless lawsuits to delay a project because they cannot defeat a project on the merits of the project itself. When projects are tied up or delayed because of court proceedings in the courts, not only are critical American infrastructure projects stalled, but also our members are not working, they are not putting food on the table, and they are not providing for their families.

In the Northeast region, this is the reality. Union construction workers stand ready to build necessary pipeline infrastructure to deliver Marcellus Shale

natural gas to utilities, industry, critical infrastructure like our schools and hospitals, and to consumers.

The region's notoriously high energy prices have met a perfect storm in the form of inadequate natural gas infrastructure being coupled with the delay of Constitution and Northern Access Pipeline projects. ISO New England recently highlighted that four gigawatts of natural gas-fired generation capacity – 24% of the region's gas-fired net winter capacity – was at risk of not being able to get fuel when needed.

And a safe, modern, and affordable solution, the Constitution pipeline, was delayed from being built after already receiving FERC approval. This permit denial is still delaying about 2,400 direct and indirect jobs from the pipeline construction generating $130 million in labor income and economic activity for the region. The decision continues to cost local governments approximately $13 million in annual property tax revenue.

Unfortunately, the Clean Water Act Section 401 permitting process has resulted in needless uncertainty. This can stymie approval for years – or, worse, halt a half-completed construction project in its tracks. By some

estimates, a six-year delay in starting construction on public works, including the effects of unnecessary pollution and prolonged inefficiencies, costs the nation over $3.7 trillion[i].

Let me be clear. When lawsuits aimed squarely at killing projects are brought forth for politically motivated reasons, it hinders our ability to create jobs and prepare the next generation of construction workers for tomorrow. These unnecessary delays thwart needed infrastructure progress, and impede NABTU members from working and earning a paycheck.

We must have regulatory certainty.

North America's Building Trades Unions strongly supported the FAST-41 reforms because they lead us toward a path of standardization and finality in the permitting process. We've supported the thoughtful steps taken to reform the system while maintaining the underlying regulations that protect the health and safety of our members on the jobsite and the environmental and human impacts of projects on communities across the country.

We will continue to be engaged with Congress and federal agencies as sensible regulatory reforms are identified and implemented.

Case in point, the reforms made by S. 3303. Requiring states to tell an applicant whether they have all the materials needed to process a certification is commonsense. The clarification that the scope of a Section 401 review is limited to only water quality impacts needs no explanation. We support reforms that reign in the legal challenges while thoughtfully protecting the environment, the public, and worker safety on the job.

On behalf of NABTU and our affiliates, thank you for the opportunity to testify. I look forward to the committee's questions.

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[i] *Two Years Not Ten Years: Redesigning Infrastructure Approvals.* Common Good. Web. Accessed 12/7/15. (http://commongood.3cdn.net/c613b4cfda258a5fcb_e8m6b5t3x.pdf)

Testimony of CJ Stewart of
the National Tribal Energy Association

Senate Committee on Environment and Public Works
"Hearing to Examine Implementation of Clean Water Act Section 401 and S. 3303, the Water Quality Certification Improvement Act of 2018"

August 16, 2018

CJ Stewart's 401 Testimony

Thank you Chairman Barrasso, Ranking Member Carper, and Members of the Environment and Public Works Committee. I appreciate the invitation and the opportunity to testify before this Committee on examining implementation of Clean Water Act (CWA) 401 and your accompanying legislation.

My name is CJ Stewart, and I am a Crow Tribal member and a Board Member and Co-Founder of the National Tribal Energy Association, or NTEA. NTEA advocates for both tribes and industry to promote healthy and sustainable energy economies on Native American lands. I am also currently in private practice as an energy consultant for Indian energy development and infrastructure.

I previously served two terms as a Senator for the Crow Legislative Branch and as Chairman of the Crow Natural Resource & Infrastructure Development Committees from 2007-2015. In 2016, at the request of Chairman Darrin Old Coyote, 21st Chairman of the Crow Nation, I held the position of Crow Nation Energy Advisor and Legislative Liaison. During this time, I was also appointed as Vice Chairman of Congressman Ryan Zinke's Natural Resource Advisory Committee.

Lastly, I worked for 10 years as a union coal miner hauling Crow coal and was the first Native American to be appointed to serve on the Montana Coal Board, where I was voted Vice Chairman.

Tribal economies face many obstacles to success, and currently the economy of the Crow Tribe is facing a critical crisis. While we are blessed with untold mineral wealth in oil, coal, and gas on the Crow reservation, regulatory roadblocks and political crises force us to languish in poverty. The tribe currently has an unemployment rate of 70% or more, and

hopelessness is beginning to cast a shadow where there was once hope for a vibrant and prosperous future.

Imagine having a trillion dollars in mineral wealth under your feet and yet your people are starving and destitute before you. It's a cruel nightmare that could be avoided if not for the Clean Water Act being weaponized against the Crow Tribal resource economy and the Crow people and culture.

Clean Water Act Section 401 was intended to provide states with a way to apply key water quality protections to federally permitted activities. However, certain states have misused the process to block Crow economic projects for political reasons that have nothing to do with water quality. These states have hijacked the 401 certification process and used it as a means to interfere with tribal and international trade policy in violation of the Commerce Clause of the U.S. Constitution, including and specifically the Indian Commerce Clause.

The economic prosperity of tribal communities throughout the country is dependent on the flow of goods to port facilities that is unencumbered by physical, commercial, or political roadblocks. Surely the founding fathers saw the necessity of the Indian Commerce Clause for tribal nations against hostile and racist actors be they private or public who bore animosity against native peoples. Importantly, these laws were put in place to protect sovereign tribal economic activity, but recent and ongoing activity on the part of certain coastal states severely infringes on the rights of states and tribes without direct access to export facilities to engage in interstate commerce.

The Crow Nation is deeply respectful of the need for states and tribes to be able to protect their own waters from projects that would degrade water quality and infringe upon water use. We are also needing of the same respect in terms of our commercial endeavors including our sovereign resource development and commercialization. Unlike these aforementioned hostile actors who are so detrimental to the quality of life for the Crow people, we seek no power over or ill will toward them. We instead seek a legislative remedy that maintains equal and fair application of the law.

The Water Quality Certification Improvement Act of 2018 is such a legislative remedy and does not inhibit the ability of states and tribes to enforce their water quality laws. Rather, it provides necessary transparency and clarity to the 401 process, while preserving the central role of tribes and states in protecting local waterways.

The U.S. holds more of the world's coal reserves than any other country, and the coal mined by the Crow Nation is preferred by high efficiency, low emission power plants that are in operation and being built around the world. However, even though our coal resources provide a critical component of U.S. export trade, our ability to get our coal to fast-growing Asian markets is being hindered by states on the West Coast who continue to refuse to grant needed approvals to build state of the art export facilities for political – not water quality – reasons.

The Water Quality Certification Improvement Act of 2018 ensures that water quality certifications focus on their intended environmental purpose – the protection of local waterbodies potentially impacted by federally licensed activities. It will therefore protect the health of local communities while simultaneously promoting the ability of tribes and landlocked states to exercise their right to engage in interstate commerce and grow the economy.

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September 12, 2018

The Honorable John Barrasso
Chairman, Senate Environment & Public Works Committee
307 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Tom Carper
Ranking Member, Senate Environment & Public Works Committee
513 Hart Senate Office Building
Washington, DC 20510

Dear Chairman Barrasso and Ranking Member Carper:

On behalf of Millennium Bulk Terminals-Longview LLC, (Millennium) please accept this letter in support of the *Water Quality Certification Improvement Act of 2018.* As you know, Millennium proposes to build a coal export terminal on the lower Columbia River. Based on our experience in being the only project proponent to have received a water quality certification denial "with prejudice" in Washington State, and the only project to have been denied a water quality certification on the basis of non-water quality factors, we share your belief that the Clean Water Act (CWA) is to be used to protect water quality, and should not be misused to block projects that might be unpopular to some. Congress never intended that the limited authority provided to *states* under CWA section 401 to weigh in on the propriety of a proposed *federal* permit would be used by states to veto projects based on political concerns having nothing to do with water quality.

To the contrary, as you well know, section 401 was promulgated to enable states to ensure that federally permitted projects would not result in water quality standards violations in state waters. Recent developments in Washington State demonstrate that the CWA, as presently worded, is susceptible to abuse by state actors who have little regard for the *cooperative* federalism imbedded in the statute, and who wish, instead, to dictate whether a federal permit should be issued (or not) by manipulating the section 401 certification process for their political purposes.

In addition to providing support for the proposed legislation, this letter responds to the comments of Washington State Department of Ecology (Ecology) Director Maia Bellon. Director Bellon's letter to Chairman Barrasso dated August 15, 2018, addressed both the Committee's proposed legislation and her decision to deny Millennium a section 401 certification "with prejudice." Director Bellon insists that she denied Millennium's section 401 certification because her agency found that Millennium "failed to

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meet existing water quality standards;" and because Millennium failed to propose any mitigation to offset adverse environmental impacts. As we demonstrate below, these statements are patently false.

First, her lawyers insisted-- -- based on sworn statements from Ecology staff-- that the agency's denial "with prejudice" was *not* based on CWA factors, but was instead based entirely on authority under the Washington State Environmental Policy Act (SEPA). Unless her lawyers and staff provided false testimony to the administrative tribunal, Director Bellon's letter to Congress is at best mistaken, or otherwise simply false.

Second, contrary to Director Bellon's letter, Millennium has both proposed and submitted to Ecology a host of mitigation plans for environmental impacts. We are providing the following information to clear up any discrepancy in the record Director Bellon's letter created concerning Millennium, and to highlight for the Committee the grossly unfair treatment we received from the Department of Ecology at the direction of Director Bellon, and thus, the need for your proposed legislation.

At Millennium, we are committed to protecting the water resources of the state and federal government and we take that responsibility seriously. We were heartened that the Final Environmental Impact Statement published by the state of Washington and Cowlitz County (SEPA FEIS) concluded that our project would not result in significant adverse impacts to water quality, wetlands, aquatic biota, or fish. Notwithstanding these favorable water quality conclusions in the SEPA FEIS, Ecology Director Bellon denied the water quality certification based largely on indirect impacts from trains and vessels, and specifically, impacts that included air emissions from locomotives, impacts on vehicular traffic, rail capacity concerns and train -caused noise and vibrations, among other non-water quality factors.

Millennium Coal Export Terminal

Millennium is proposing to locate a coal export terminal on a 190-acre brownfield site on the Columbia River near Longview, Washington. At full build-out, the project would be capable of shipping up to 44 million metric ton per year to markets in Asia. The site was selected after a review of more than 20 sites on the west coast of the US, Canada and Mexico for its existing infrastructure. The project would reuse a portion of an industrial site originally developed for the aluminum industry during World War II, coexisting with an operating bulk product terminal. Coal from the Powder River or Uinta Basins would be transported by unit trains to the site over existing rail lines. Two new docks would be constructed on the Columbia River, providing access to Panamax-sized vessels that can reach the site via the existing US Army Corps of Engineers dredged shipping channel.

The project site is located in Cowlitz County, Washington, a county with unemployment rates that far exceed other Washington counties. Cowlitz County residents have expressed a strong support for the family-wage construction and operation jobs that would come with the project, and would provide opportunities for workers to stay close to home rather than having to commute long distances to find work.

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Millennium's objective is to transform the former Reynolds smelter site into a new, economically vibrant and environmentally responsible world-class port facility. To accomplish this, we are actively and voluntarily working with state and local agencies in our cleanup efforts. Millennium, Northwest Alloys (Alcoa) and Ecology have entered a voluntary agreement to ensure the cleanup of the site follows all state rules and regulations. Evidence of localized contaminants from Reynolds' operations has been measured, and although the site has been classified by Ecology as low-risk, we are closely and carefully coordinating an extensive cleanup process. Cleanup costs are carried by the private entities and not the public. Reports on the progress of our efforts are regularly submitted to local and state agencies. By conducting a thorough investigation and developing cleanup plans in compliance with applicable laws and regulations, we are a step closer to our goal of building a world-class port facility in an environmentally responsible way.

Permitting History

Millennium applied for local (Cowlitz County), state, and federal permits for the project in February 2012, over six years ago. In order to provide full disclosure of all of the potential impacts of the project, we have provided the agencies with over 15 million dollars to pay for a third party consultant to write separate state (SEPA) and federal (NEPA) EISs. The 13,600 page SEPA EIS was completed in April 2017. The NEPA Draft EIS was published in September 2016.

Ecology's Denial of Millennium's CWA Section 401 Water Quality Certification

Director Bellon's letter attempts to defend her agency's actions in denying the project a Section 401 Water Quality Certification. According to Director Bellon: *"The facts of this denial are simple: Millennium failed to meet existing water quality standards and further failed to provide any mitigation plan...."*

This statement is in direct contradiction to her department's reply brief to the Washington Pollution Control Hearing Board (PCHB) insisting that Ecology did not deny the certification "with prejudice" based on the deficiencies set forth in Section III (water quality) of the denial Order. That part of the Denial Order dealt with information that Ecology alleged was both missing and necessary for it to *first make* a determination as to whether it had "reasonable assurance" that the project would not violate water quality standards. In other words, Section III of the Order stated that Ecology simply could not determine based on the information it had, *whether or not* project discharges would comply with water quality standards.

Accordingly, the case she lays out in her letter to you is flatly contradicted by the plain language of the Denial Order itself. At best, it is inconsistent with both Ecology testimony during the appeal of the permit denial and the findings of the Washington PCHB (Decision at paragraph 19 concluding that the Denial "with prejudice" was based solely on SEPA), and at worst, is plainly disingenuous.

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Instead of properly relying on the CWA, Ecology insisted that Director Bellon *"decided to exercise Ecology's SEPA substantive authority on the first permit decision before her —the 401 certification-- and deny the certification with prejudice."* Ecology explained that *"the reason Ecology issued the denial "with prejudice" is that the significant, adverse, impacts identified in the EIS cannot reasonably be mitigated. Since they cannot be mitigated, there is no way for Millennium to address them and consequently no basis on which to continue keeping the section 401 process open."* In short, the record demonstrates that the denial "with prejudice" was based on anything other than water quality concerns, and in no way stemmed from any agency findings or conclusions that Millennium's proposed project would not be able to comply with water quality standards.

SEPA Findings and Proposed Mitigation

Similarly, Director Bellon's claims as to the impacts and risks that the project would pose are both contrary to testimony of her own lawyers and staff, and to the findings of the SEPA EIS. Her agency undeniably concluded in the Final EIS that Millennium's proposed coal export project will not have a significant adverse effect on water quality. Millennium is now appealing Ecology's certification denial, and the PCHB's decision upholding that denial, because both Ecology and the PCHB have inaccurately applied the CWA to our project. We are confident the law is on our side.

In her letter to you, and in other public statements, Director Bellon makes claims that are not supported by the SEPA EIS her own agency produced. Director Bellon wholly ignores the mitigation that Millennium has proposed to more than offset wetland and habitat losses. Among her claims, and the rebutting facts found in Ecology's EIS, are the following:

Bellon Claim:

> **The project would destroy 24 acres of wetlands on the site.**
>
> **FACT:** As stated in Section 4.3 of the SEPA FEIS, 24 acres of existing wetlands would be filled. Millennium submitted a Conceptual Mitigation Plan in May 2017 to the U.S. Army Corps of Engineers (Corps), Cowlitz County and Ecology. The Mitigation Plan identifies a nearby downriver site that is currently a ditched and drained agricultural pasture. The Plan would convert the pasture into 61 acres of wetlands, rehabilitate approximately 14 acres of degraded wetlands, and revegetate approximately 14 acres of upland buffer, providing a total of 88 acres of mitigation. This mitigation proposal provides more than what is required for wetland mitigation and is intended to insure against any unforeseen shortfalls in wetland creation. Neither the Corps nor the County has found the Plan to be inadequate. To the contrary, the County reviewed the plan, determined it to be adequate and issued a permit for that activity in July 2017.

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Section 4.3 of the SEPA FEIS concludes: *"Compliance with laws and implementation of the mitigation measures described above would reduce and compensate for impacts on wetlands. There would therefore be no unavoidable and significant adverse environmental impacts on wetlands."*

Most of the wetlands that will be impacted by the proposal (over 21 acres) are considered Category III wetlands, and only three acres are considered Category IV wetlands. Washington State ascribes this rating system to wetlands based on their functions. Washington State Wetland Rating System for Western Washington (Hruby 2006). Category I wetlands have the highest level of function, are afforded the widest buffers, and impacts on such wetlands require the largest amount of compensatory mitigation. Category IV wetlands, on the other hand, have the lowest level of function, are afforded more narrow buffers, and impacts on such wetlands require a lower amount of compensatory mitigation.

Millennium's proposed wetland mitigation plan would convert an existing ditched and drained agricultural pasture to a diverse habitat of emergent, forested and scrub-shrub wetlands within the historic, and now disconnected, floodplain of the Columbia River. The proposed mitigation would restore hydrology and historic forested and scrub-shrub wetlands, and provide potential habitat for wildlife such as Columbia white-tailed deer. In total, the mitigation would convert over approximately 61 acres of upland pasture to palustrine forested, scrub-shrub, and/or emergent wetlands, rehabilitate approximately 14 acres of degraded emergent wetlands and revegetate approximately 14 acres of upland buffer.

Bellon Claim:

Dredging 41 acres of river bed would damage Washington's water quality.

FACT: The dredging would be required to provide ships access from the US Army Corps maintained Columbia River shipping channel to the proposed new docks. As required by the Corps and other agencies, a sediment characterization report has been prepared. On August 25, 2017, Jennifer Sutter, Project Manager for Oregon's Department of Environmental Quality (DEQ), found that the dredge material would meet Class A criteria because the dredged spoils contain constituents at a level below detection levels for chemicals, metals and pesticides of concern to water quality. Dredge material that meets Class A criteria by definition does not impair water quality.

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Bellon Claim:

Driving 537 pilings into the river bed for over 2,000 feet of new docks would result in the loss of five acres of aquatic habitat.

FACT: Millennium has proposed to construct an aquatic habitat mitigation site by converting an existing, isolated pond to an off-channel aquatic habitat connected to the Columbia River. Our Conceptual Mitigation Plan for Wetlands and Aquatic Habitat was submitted to Ecology, Cowlitz County and the Corps in May of 2017. Cowlitz County has approved the plan and issued a Critical Areas Permit for the project in July 2017. Millennium proposes to construct the Off-Channel Slough Mitigation Site, which will provide seasonally-inundated off-channel habitat with associated emergent and riparian vegetation, by improving an existing pond and connecting it to the river. This habitat type was historically widespread but has since been vastly reduced throughout the lower Columbia River system. The pond is located along the shore, riverward of the levee, in the upstream portion of the Millennium lease area adjacent to the bulk terminal. As described below, approximately 12 acres of new habitat would be created to more than offset the loss of the five acres.

This compensatory mitigation will provide new off-channel aquatic habitat, which is highly valuable to juvenile salmonids of the lower Columbia River and has been disproportionately lost through development and management of the Columbia River. The proposed Site will achieve the following environmental goals:

- Provide off-channel aquatic habitat that is connected to the Columbia River.
- Ensure access to the off-channel habitat for juvenile salmonids.
- Provide structurally diverse native vegetation communities within the off-channel habitat.
- Provide structurally diverse native riparian vegetation on the outer berm.

Functional objectives detail how the goals of the mitigation action will be implemented. The functional objectives for the Aquatic Mitigation Action are as follows:

- Provide 7.0 acres of new off-channel aquatic habitat below OHW that incorporates emergent, shrub, and forested components.
- Provide an effective connection between the Columbia River and the off-channel habitat.
- Establish 4.5 acres of native emergent, shrub, and tree species within the off-channel habitat.
- Establish 0.75 acre of native riparian vegetation on the outer berm.

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Bellon Claim:

The application provided insufficient information on how contaminated wastewater and stormwater would be managed at the site during both construction and operations. The application did not provide sufficient information to demonstrate that wastewater and stormwater discharges would meet state water quality standards, including an inadequate description of the types and amounts of contaminants in the discharge, and an incomplete analysis of how the treated discharge would potentially impact the ambient water quality of the Columbia River. The application did not provide sufficient information on how contaminated wastewater and stormwater would be adequately controlled to minimize the discharge of pollution to the Columbia River.

FACT: Section 4.5 of the SEPA FEIS describes the best management practices proposed by MBT-Longview and the robust measures available and proposed for managing wastewater and stormwater during both construction and operations. The SEPA FEIS acknowledges that impacts could occur but that the level of impacts would be below benchmarks or applicable standards designed to protect water quality. The SEPA FEIS made repeated findings that the project would not result in significant adverse effects to water quality, wetlands, fish, and the aquatic environment more generally and anticipated that technology was available and would be implemented to ensure that any impacts would be mitigated in accordance with applicable water quality standards. Section 4.5 of the SEPA FEIS concludes: *"Compliance with laws and implementation of the measures and design features described above would reduce impacts on water quality. There would be no unavoidable and significant adverse environmental impacts on water quality."*

Millennium submitted detailed information to Ecology to demonstrate its ability to meet water quality standards sufficient for a section 401 certification, but Ecology decided not to work with Millennium to complete the certification process. Ecology and Director Bellon decided instead to abruptly terminate the process and deny the certification "with prejudice" to veto the project altogether, and in so doing, relied on non-water factors found in that same EIS.

Bellon Claim:

The company would need access to sufficient water supplies to manage coal dust and to suppress fires during normal operations at the site. The company could not demonstrate they had sufficient rights to use water wells on the site for these purposes.

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FACT: As stated on page 4.4-23 of the SEPA FEIS: *"Approximately 1,200 gpm during the wet season and 2,000 gpm during the dry season (approximately 2,034 AFY) would normally be required for dust suppression. On-site groundwater wells would provide approximately 635 gpm (1,025 AFY) to maintain minimum water levels in the storage pond to meet process water demands during the dry season. Water from the storage pond could also be used for the fire hydrant, sprinklers and deluge systems, watering of landscoping and other non-recyclable uses. Northwest Alloys holds water rights that originally authorized extraction of 23,150 gpm up to a total volume of 31,367 AFY." "The total demand accounts for less than 10% of the maximum pumping limit allowed under original water rights. Therefore, operation of the Proposed Action would have a negligible impact on groundwater supply. The Applicant would ensure that water rights are current before withdrawing any water for construction or operations; water rights would be maintained for angoing groundwater use during operation of the Proposed Action."*

The Columbia River is not a closed basin, and new water rights can be obtained if needed.

Bellon Claim:

Because the site is a toxic cleanup site from past smelter operations, it has preexisting groundwater and soil contamination. The application needed to show how construction would affect this contamination and future cleanup work, and ensure that the discharge would continue to meet water quality standards. The application did not provide sufficient information to show that construction activities would be conducted in a way that would ensure that the existing contamination at the site would be properly contained and managed.

FACT: There has been an extensive (over 12 year) process to develop both a renewed NPDES permit for the site and a Remedial Investigation/Feasibility Study (RI/FS) on voluntary site cleanup. The cleanup site is ranked by Ecology as a 5 (on a 1 to 5 scale), which is the lowest risk ranking for both human health and the environment. As noted on page 4.4-18 of the SEPA FEIS, *"Canstructian af the Praposed Action could encounter previously contaminated areas currently identified in the MTCA Cleanup Actian Plan, which could degrade graundwater quality. Hawever, with the exception af twa small areas—the eastern carner af the Flat Storage Area and the northeastern partion of Fill Deposit B-3 (Figure 4.4-5 in the FEIS)—cleanup actions are not recommended in the draft Cleanup Action Plan within the project area. For the Flat Storage Area and Fill Deposit B-3, construction and remediation activities would be coordinated to prevent spread of contamination or environmental impacts."*

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Waiver

As you know, under current law, the State was required to issue a final certification decision within one year of receipt of Millennium's application for a CWA Section 401 certification. 33 U.S.C. § 1341(a)(1)("if the state. . . fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements. . . shall be waived with respect to such Federal application."). To accommodate agency processes, Millennium applied for a CWA Section 401 certification three times over the last six years of permit processing. Millennium first applied for a CWA Section 401 certification on February 22, 2012 as part of its Corps permit application. At the Corps' request, Millennium withdrew the application to allow time for the completion of the EISs. On July 13, 2016, as the SEPA EIS neared completion, Millennium again submitted an application for a CWA Section 401 certification. To allow for additional time for Ecology to consider Millennium-provided reports and materials, and at Ecology's request, Millennium withdrew this application once again on June 21, 2017 and reapplied for the third time on June 27, 2017. Therefore the State was required to issue a final decision on that application by June 27, 2018.

Although Ecology issued an initial decision on September 26, 2017 denying Millennium's certification, the record demonstrates that the State has waived its right to issue a CWA section 401 certification in two separate and independent ways. First, more than one year passed between Ecology's receipt of the application and the PCHB's issuance of the final 401 certification decision. During the ensuing appeal of Ecology's certification denial, Ecology told the Superior Court in Cowlitz County that its Denial Order was not final until the PCHB reviewed and decided Millennium's administrative appeal. The PCHB's decision was made more than one month after the expiration of the one year statute of limitations period set forth under CWA section 401.

Second, even if this final decision was timely (and it was not), the certification decision made by Ecology and affirmed by the Board, is not the certification required by 33 U.S.C. §1341(a)(1). Pursuant to CWA section 401, the State was required to determine whether a facility's discharge will violate "the applicable provisions of sections 1311, 1312, 1313, 1316 and 1317" of the CWA. 33 U.S.C. § 1341(a)(1). The State did not make this determination. Instead the State decided to answer a different question: whether Ecology should deny the project based on SEPA, R.C.W. §43.21C.060. But Congress did not authorize states to certify whether a proposed project should be denied under SEPA either in CWA section 401 or anywhere else in the CWA.

Conclusion

Millennium is committed to operating in a responsible manner. We value our natural environment and the safety of our employees. Our employees have lived in and around Cowlitz County for generations. They understand the unique opportunities offered by the Columbia River and the responsibility that comes with protecting the air, water and land that surround it.

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In closing, we can have clean water and a healthy environment while safely utilizing the vast natural resources provided by the Columbia River. We thank you for your efforts to clarify the original intent of the CWA, and section 401 in particular, and trust that this letter will both set the record straight as it concerns Millennium's project, and provide support for the badly needed clarifying amendment your committee is debating.

Sincerely,

Kristin Gaines
Sr. Vice President of Regulatory Affairs
Millennium Bulk Terminals-Longview

CC: Patty Murray, Senator
Maria Cantwell, Senator
Jaime Herrera Beutler, Representative
Senate Environment & Public Works Committee Members

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DEPARTMENT OF JUSTICE
OFFICE OF THE ATTORNEY GENERAL
P.O. BOX 94005
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Jeff Landry
Attorney General

February 26, 2019

The Honorable Andrew Wheeler
Acting Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460
Wheeler.andrew@Epa.gov

Dear Acting Administrator Wheeler:

States are on the front line of protecting the environment, public health, and the welfare of citizens within our respective borders. The cooperative federalism principles that are central to many of our nation's environmental statutes recognize the critical role states play and, when implemented appropriately, encourage partnership between states and the federal government.

Unfortunately, the cooperative federalism principles of the Clean Water Act are sometimes coopted to advance the political agendas of certain state actors. In particular, Section 401 of the Clean Water Act has been manipulated to block infrastructure projects that are in the public interest of other states and the nation generally. This tactic has been implemented to delay or to block vital oil and gas pipeline projects, coal projects, LNG terminal projects, and other fossil energy projects. The actions of individual state actors are disruptions to interstate commerce and negate the intent of providing the consistent and reliable permitting process envisioned by the Clean Water Act.

For example, in 2017, the State of New York unilaterally blocked the approximately $500 million interstate pipeline Northern Access Project when it denied a Water Quality Certificate for the project, notwithstanding the Pennsylvania Department of Environmental Conservation's prior issuance of a Water Quality Certificate and the FERC's prior approval of the project. Similarly, in 2017, the Washington Department of Ecology opaquely denied "with prejudice" a Water Quality Certificate for another project, the Millennium Bulk Terminal, just three business days after receiving 240 pages of additional information it requested. Without these Water Quality Certificates, these projects cannot go forward regardless of their importance to the nation. Individual state actors should not be allowed to unilaterally and negatively impact the economies of multiple other states and the nation as a whole under the guise of implementing federal law.

While the cooperative federalism principles of Section 401 may can be maintained through clarification of the process by which federal and state regulatory authorities are expected to implement the law, this clarification should recognize and preserve the states' primary

responsibility over and rights concerning water quality. Congress intended Section 401 as an opportunity for states to evaluate water quality impacts from federally-permitted projects. Instruction from EPA on the respective roles of state and federal authority within the bounds intended by the statute is needed to ensure that Section 401 is used for its intended purpose to protect water quality, to minimize its potential for misuse, and to provide predictability in permitting energy infrastructure.

As Attorneys General, we support an effort by EPA to maintain cooperative federalism and the rule of law to the Section 401 process.

Sincerely,

Jeff Landry
Louisiana Attorney General

Alan Wilson
South Carolina Attorney General

Steve Marshall
Alabama Attorney General

Ken Paxton
Texas Attorney General

Tim Fox
Montana Attorney General

Patrick Morrisey
West Virginia Attorney General

Doug Peterson
Nebraska Attorney General

May 24, 2019

United States Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Dear Administrator Wheeler,

Thank you for the opportunity to provide pre-proposal recommendations for updates to the United States Environmental Protection Agency's (EPA) guidance and regulations pertaining to Section 401 certification under the Clean Water Act (CWA). This is a well-needed step toward modernizing guidance on the application of Section 401 to help correct the misapplication of Section 401 by some states to stymie the industries and commerce of others. President Trump's Executive Order (EO) 13868 recenters the application of the law on its original purpose as a precise tool to protect our water quality, rather than a blunt tool to block commerce and advance the individual political interests of one state over another.

My comments in this letter aim to help the EPA solve a problem that has hindered the development of energy infrastructure in the United States. Wyoming is a direct victim of the misapplication of Section 401 certification denials: in 2017 the State of Washington denied certification for the Millennium Bulk Terminal based largely on non-water quality impacts. As a result, Wyoming industries were denied the opportunity to export our coal to Asian markets. Notably, Washington State's Environmental Impact Statement (EIS) lifecycle greenhouse gas analysis for the project concluded that the sourcing and utilization of Western U.S. coals would provide a net reduction in greenhouse gas emissions when compared to alternative foreign coals used in Asian coal-fired power plants. A similar maneuver has since been repeated by the Oregon Department of Environmental Quality's denial of certification for the Jordan Cove LNG terminal, thus inhibiting non-coastal states access to international markets for some 1.8 MCF of natural gas that Wyoming produces annually.

Wyoming has long been a center of energy production, providing the fuel necessary to heat homes, light cities and run American factories. While markets are changing, the bulk of Wyoming's economy is dependent upon moving our energy resources to where it is needed. It is particularly concerning to see states misapply Section 401 of the CWA in ways that negatively impact the economies of other states, in direct violation of the Commerce Clause. States should not be able to shut out Wyoming from markets.

In addition to the requirements set by EO 13868 for EPA to review specific federalism considerations underlying section 401 of the Clean Water Act, this review presents an opportunity to highlight the need for clarity regarding the definition of sources of discharge subject to Section 401 review. Under cooperative federalism, states should have a role in managing environmental standards within their borders. It is the role of the federal government to provide clear guidance, but unfortunately, the courts

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have had to clarify aspects of the law. I believe the spirit of existing Section 401 regulation is to ensure major point sources of discharge are thoroughly reviewed. However, small, non-point sources such as rainfall and snowmelt should clearly not be subject to Section 401 certification. To-date, we have seen broad legal interpretation regarding this matter. I request that EPA explicitly state what sources are subject to Section 401 certification and those that are exempt.

Section 3(a) of EO 13868 requests that EPA consult with states, tribes and other agencies for clarification of Section 401. This is directed to identify inconsistencies among State 401 programs in their certification application requirements, as well as the interpretation of Section 401(d) (conditions of other state requirements) and chronic issues of not adhering to reasonable review and certification time frames per Section 401(a)(1) and (2).

Specific to the priority topics outlined by the EO, I direct you to the following concepts outlined in the comments below. Please also refer to the comments submitted separately by the Wyoming Department of Environmental Quality and other Wyoming state agencies.

Comment #1: *Promotion of timely Federal-State cooperation and collaboration*
The following suggestions are examples of how Wyoming already works with federal agencies to streamline matters concerning Section 401 application:

- Outline a means for early collaboration with applicants, the Army Corps of Engineers (Corps) and other partners at the pre-application consultation phase. This will help address outstanding issues prior to submittal of the application for 401 certification and 404 verification.
- Develop regional general conditions for nationwide permits as well as standard 401 certification conditions for categorically certified activities.
- Hold interagency meetings at least once per year to address outstanding issues, further streamline the permitting/certification process, and to consult about upcoming large projects as well as successes and lessons learned from past permitted projects.
- Direct states to categorically certify some nationwide permits that cover common activities with low environmental risk and/or standardized practices that effectively address water quality issues.
- For projects required to undergo a NEPA review, direct states to processes or measures that address unresolved water quality concerns with the project proponent prior to a final EA or EIS.

Comment #2: *Define the appropriate scope of water quality reviews*

Federal regulations point to "appropriate requirements of state law" to assure compliance with applicable provisions of CWA. EPA should clarify guidance to states that compliance must be made to meet "requirements that control water quality pollution from the discharge and the certified activity as a whole pursuant to applicable state laws that protect surface water quality." This directs that states can only condition or deny certifications based on state laws that are directly linked to the protection of surface water quality and therefore within the scope of the CWA.

Comment #3: *Set expectations for reasonable review times for various types of certification requests*

Section 401(a)(1) of CWA already directs that states must act on a certification request "...within a reasonable period of time (which shall not exceed one year)..." Simply stated, EPA should set

enforcement requirements to ensure adherence to the one year certification requirement. More specific recommendations are provided separately by the Wyoming Department of Environmental Quality; please refer to those comments.

Comment #4: *Define the nature and scope of information States and authorized tribes may need in order to substantively act on a certification request within a prescribed period of time.*

Under this topic, I am more concerned about the conditions if or when a Section 401 certification denial must take place. For a denial to be made without prejudice, there should be a clear and reasonable assertion that project activities would result in violation of one or more surface water quality standards, would result in an increase in pollutant loading to a CWA 303(d) listed water, would not conform to applicable 401 certification conditions or Corps nationwide permit conditions, or would fail to conform to provisions in the Wyoming Environmental Quality Act. EPA should refine its parameters concerning Section 401 certification denials to adhere to these concepts.

In closing, Wyoming anticipates minimal impact to 401 certifications in Wyoming as a result of EPA's proposed guidance and rule changes and anticipates no impact to our ability to protect water quality. Section 401 certification decisions in Wyoming are entirely water quality based -- the State works within reasonable timeframes for review and certification that overlap with those of our federal partners.

With these comments in mind, I anticipate that EPA can now set clear guidance that will hold all states to this same standard. Thank you for the opportunity to weigh in.

Please reach out to Beth Callaway (beth.callaway@wyo.gov; 307-777-8204) or Renny MacKay (renny.mackay@wyo.gov; 307-777-5461) in my office should you have any questions.

Sincerely,

Mark Gordon
Governor

CC: The Honorable Mike Enzi, U.S. Senate
The Honorable John Barrasso, U.S. Senate
The Honorable Liz Cheney, U.S. House of Representatives

October 21, 2019

United States Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Dear Administrator Wheeler,

Thank you for the opportunity to provide pre-proposal recommendations for updates to the United States Environmental Protection Agency's (EPA) proposed final guidance pertaining to Section 401 certification under the Clean Water Act (CWA). As the EPA has stated in its proposal, "Over the last several years litigation over the section 401 certifications for several high profile infrastructure projects have highlighted the need for the EPA to update its regulations to provide a common framework for consistency with Section 401 and to give project proponents, certifying authorities and federal licensing and permitting agencies additional clarity and regulatory certainty."

In May of this year, I submitted comments to the EPA that detailed Wyoming's interest in a clearer, more modernized approach to Section 401 guidance and implementation. As I have pointed out, Wyoming has been adversely impacted by the misapplication of other states' CWA Section 401 certifications. Our interest in a streamlined 401 certification process is founded by the fact that a large portion of Wyoming's economy depends on our ability to export our energy products to the markets that demand them, particularly markets located overseas in Asia. In the case of the Millennium Bulk Terminal, Washington State blocked the terminal's construction by inappropriately denying the State's Section 401 certification on account of non-water quality related impacts -- an illegal maneuver based on alleged effects that are outside of the scope of Section 401.

My review of the proposed rule is conducted with an eye toward ensuring that no other state's economic vitality is put at risk by the agenda of another. In so doing, I agree that the most challenging aspects of Section 401 guidance concern the scope of review, action on a certification request, and the amount of time available for a certifying authority to act. States, tribes, federal agencies, and project proponents will benefit by knowing what is required and what to expect during a Section 401 certification process. A modernized approach to Section 401 will reduce uncertainty and prevent misuse.

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Section 401 certification should be focused, be efficient, and appropriately balance the federal government's jurisdiction with state autonomy. I applaud the EPA's intent to update its guidance with these goals in mind. However, there still is some work to do. This letter details recommendations on behalf of the State of Wyoming; please also refer to detailed comments submitted separately by the Wyoming Department of Environmental Quality and other Wyoming organizations.

Scope of review *-- Limit Section 401 review to considerations of water quality*
There is no risk of overstating the importance of the Congressional purpose of the CWA: to protect and maintain water quality. Certifying authorities have previously interpreted the scope of Section 401 in a way that resulted in the incorporation of non-water quality related considerations into their certification review processes. Washington Department of Ecology's decision to employ the State's discretionary, policy-based denial of the Millennium Bulk Terminal Section 401 certification is one such example.

In the proposed rule, the EPA concludes that the scope of a Section 401 review or action "must be limited to considerations of water quality impacts from the potential discharge associated with a proposed federally licensed or permitted project." Wyoming adamantly supports this approach. Wyoming also supports the EPA's proposal to tie water quality requirements to "CWA and the EPA-approved state or tribal CWA regulatory programs provisions."

Certification processes *-- Conditions and basis for denials*
As I previously stated in my May 24, 2019 letter to the EPA, I support advance coordination between states and federal agencies to streamline federal permitting actions. Thank you for taking this approach into consideration in the proposed draft rule. Additional recommendations concern two key aspects of certification processes:

Conditions
I support the EPA's proposal to define certification conditions as "a specific requirement included in a certification that is within the scope of certification." This guidance appropriately ties certification approvals back to the purview of Section 401 as previously discussed: water quality requirements.

Denials
Certification denials are a major basis for Wyoming's interest in the EPA's modernization of Section 401 guidance. Again, Washington Department of Ecology's

denial of the Millennium Bulk Terminal Section 401 certification was discretionary and solely policy-based with loose, if not absent, connection to impacts on water quality.

The EPA's proposed rule recommends that a certifying authority may choose to deny a certification if it is "unable to certify that the proposed activity would be consistent with applicable water quality requirements." Wyoming supports this approach as long as the proponent is granted proper channels to supply necessary information. Wyoming also suggests that the EPA consider terms that preclude the use of denials "with prejudice." Such as in the case of the Millennium Bulk Terminal, the Washington Department of Ecology denied the project proponent's 401 certification application "with prejudice," meaning that the proponent could never reapply. It is likely that most certifying authorities would opt to approve certifications with conditions in cases where information is insufficient or design modifications need to be made in order to meet water quality requirements. However, Wyoming is keenly aware that some states may opt instead to use certification denial "with prejudice" as a tool to hamper projects from being implemented. This must be prevented.

Additionally, the proposed rule considers whether or not the EPA could invoke conditions or veto authority under language in Section 401(d). I wholeheartedly support the EPA's general interpretation that the EPA must recognize and preserve state authority over land and water resources within their borders. However, I do not support additional means under which the EPA may elect to overturn a state's certification denial or condition a project after the certifying authority has performed its due diligence. Neither the EPA nor a federal permitting or licensing agency has the authority to directly overturn a state's certification denial. The final determination on whether the state certification denial is within the scope of water quality certification is properly decided through state judicial procedures.

Timeline for review

The CWA and relevant case law articulate that certifying authorities must act on a Section 401 certification within a reasonable period of time, which must not exceed one year. Section 401 certification decisions in Wyoming are entirely water quality-based and easily achieved within one year of receipt of certification requests. I support the one-year maximum time limit, as originally intended under the CWA, to ensure regulatory certainty. In order to guarantee that the required timeline for review is met, the EPA should also consider setting enforcement requirements for the one-year turnaround into its final rule. Please refer to the Wyoming Department of Environmental Quality's comment letter for additional details concerning the reasonable period of time to act on a certification and time extension requests.

Moreover, Wyoming underscores the value of conducting pre-application meetings in order to assure an efficient, timely certification process. However, the process and format for these pre-application meetings should be left up to state discretion.

Overarching comments
The EPA poses several questions in its proposed rule that merit further discussion:

Additional guidance
The EPA requests if there should be additional guidance upon completion of this rulemaking. From a regulatory process point of view, it would be appropriate for the EPA to provide guidance after the final rulemaking and thereby rescind or revise the previous guidance. However, this will depend on how clearly the final rule reads. I suggest that the EPA solicit feedback on the merits for additional guidance after the final rule is issued.

State authority and commerce
The EPA questions if the proposed regulations appropriately balance the scope of state authority under 401 with Congress' goal of facilitating commerce on interstate navigable waters. Wyoming contends that this can be achieved through a better-defined approach to 401 certifications that narrows the scope to keep Section 401 reviews to what Congress intended. The proposed rule, with modifications pursuant to Wyoming's requests, would achieve this goal.

In closing, one last consideration: Wyoming maintains a positive, cooperative working relationship with the EPA national, regional and local personnel. Although Wyoming does not foresee any issues upon implementation of the new Section 401 rule, in the off chance that states and the EPA do not see eye-to-eye on certification decisions, I suggest that the EPA consider building dispute resolution processes into the final rule.

Thank you for taking a hard look at states' positions and taking great care to address the substantive and constructive feedback Wyoming has provided. I look forward to seeing the final rule. Please reach out to Beth Callaway (beth.callaway@wyo.gov; 307-777-8204) in my office should you have any questions in the meantime.

Sincerely,

Mark Gordon
Governor

cc: The Honorable Mike Enzi, U.S. Senate
The Honorable John Barrasso, U.S. Senate
The Honorable Liz Cheney, U.S. House of Representatives
Leslie Rutledge, Arkansas Attorney General
Steve Landry, Louisiana Attorney General
Kevin Stitt, Oklahoma Governor
Doug Burgum, North Dakota Governor
Dr. Troy Thompson, President, Wyoming County Commissioners Association
Bobbie Frank, Executive Director, Wyoming Association of Conservation Districts
Todd Parfitt, Director, Wyoming Department of Environmental Quality

Lighthouse
RESOURCES INC

October 21, 2019

Submitted electronically at http://www.regulations.gov

Ms. Lauren Kasparek
Oceans, Wetlands, and Communities Division
Office of Water (4504-T)
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue NW
Washington, DC 20460

RE: Docket ID No. EPA-HQ-OW-2019-0405 --- Updating Regulations on Water Quality Certification

Lighthouse Resources Inc. ("LRI") and its indirect, wholly-owned subsidiary Millennium Bulk Terminals-Longview, LLC ("Millennium") (collectively, "Lighthouse") jointly submit these comments on EPA's proposed rule: Updating Regulations on Water Quality Certification (Federal Register / Vol. 84, No. 163 / Thursday, Aug. 22, 2019 / Proposed Rules) (the "Proposed Rule").

LRI is a privately held company headquartered in Salt Lake City, Utah. LRI and its subsidiaries own and operate two coal mines, one in Montana and one in Wyoming.

Millennium operates an existing bulk products marine terminal in Longview, Washington on the Columbia River. Millennium has proposed to build a coal export terminal at the bulk terminals site to receive coal from inland coal mines for loading and shipment to customers in northeast Asia—primarily Japan and South Korea (the "Project").

To receive its permits, Millennium sought a Clean Water Act, Section 401 water quality certification from the Washington Department of Ecology ("Washington Ecology") for nearly six years. As part of the 401 certification process,, Millennium has spent over $15 million to obtain an environmental impact statement ("EIS"), which originally began as a dual EIS under the National Environmental Policy Act ("NEPA") and the Washington State Environmental Policy Act ("SEPA"), with the US Army Corps of Engineers as the lead agency under NEPA and with the Washington Ecology and Cowlitz County as co-lead agencies under SEPA. In September 2013, the state and federal agencies agreed to separate and prepare both a federal EIS and a state EIS.

The state EIS concluded with respect to the Project that "**There would be no unavoidable and significant adverse environmental impacts ou water quality.**"[1] Lighthouse submits these comments because its experience with Washington Ecology and the Section 401 process has cost tens of millions of dollars, and hundreds of millions of dollars in lost revenues for its export terminal. Millennium's experience with Washington Ecology and the Clean Water Act Section 401 process demonstrates precisely why the Proposed Rule is necessary and should be promulgated in full.

[1] State Environmental Policy Act, Final Environmental Impact Statement, dated April 28, 2017, Section 4.5.8 (emphasis added).

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Washington Ecology has horribly abused the cooperative federalism afforded the State of Washington by Congress in the Clean Water Act by completely ignoring these water quality findings with respect to the Project. Lighthouse believes that by sharing our experience in trying to obtain a 401 water quality certification from Washington Ecology, the Environmental Protection Agency ("EPA") will see an example of a rogue agency using the 401 process as a weapon against disfavored projects. Lighthouse encourages the EPA to promulgate all aspects of the Proposed Rule.

Notwithstanding the unambiguous conclusion on water quality, five months later, Maia Bellon, Director of Washington Ecology denied Millennium's Section 401 water quality certification, "***with prejudice***."[2] Washington Ecology has never before, nor ever since, denied a water quality certification with prejudice.

On Washington Ecology's website discussing the Project, in its Frequently Asked Questions section, it poses and answers the following question: "What does it mean to deny the permit with prejudice? We denied the water quality permit with prejudice – a legal term that means that the decision is final and the applicant cannot reapply."[3] The Proposed Rule would not afford Washington Ecology the authority to grant itself the power to deny a 401 certification with prejudice.

The Section 401 Denial Order is wholly inconsistent with the analysis and conclusions set forth in the EIS. Instead of focusing on water quality for the 401 certification denial, Washington Ecology focused on nine non-water quality impacts, mostly relating to rail transportation. None of these Project impacts relates to water quality.

Washington Ecology's decision to deny the 401 certification was "surprising" to its SEPA co-lead agency, Cowlitz County. "Ecology's decision to deny the 401 water quality certification request was especially surprising to [Cowlitz County officials and staff] because the FEIS unequivocally found no unavoidable and significant adverse impacts—potential or otherwise—on water quality. Based on the FEIS, there is no question the company can satisfy all local and state water quality standards. That is what the FEIS concluded."[4] Instead, Washington Ecology used the Clean Water Act process to kill the Project because it was a fossil fuel infrastructure project.

The co-lead agency for the SEPA EIS, Cowlitz County concluded that Washington Ecology issued the 401 Denial Order in order to further certain policy objectives. "Based on [Cowlitz County's] experience working on the FEIS, [we] can only conclude that those aspects of the 401 Denial relying on the FEIS are pretext, and that the real reason for the permit denial is to further unstated State policy preferences. I am unaware of any other instance in which Ecology or another state agency denied a permit based on potential impacts similar to those outlined in the FEIS. I believe that if these indirect impacts were truly significant and not mitigable, then state and local agencies would be forced to deny all manner of port, shipping, and transportation permits."[5]

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[2] Order #15417, Corps Reference #NWS-2010-1225, Millennium Bulk Terminals-Longview, LLC Coal Export Terminal – Columbia River at River Mile 63, near Longview, Cowlitz County, Washington, dated September 26, 2017 ("401 Denial Order").

[3] https://ecology.wa.gov/Regulations-Permits/SEPA/Environmental-review/SEPA-at-Ecology/Millennium

[4] Sworn Declaration of Elaine Placido, Director of Community Services, Cowlitz County, filed March 8, 2019.

[5] *Id.*

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Said differently, Washington Ecology abused the principles of cooperative federalism established in the Clean Water Act to stop a project that is perfectly legal to build—a project that could meet all water quality standards and requirements. Washington Governor Jay Inslee, and others in his administration, including Washington Ecology Director Bellon, have expressed their belief that no fossil fuel infrastructure projects should ever be built in the State of Washington. Denying Millennium's 401 water quality certification was the way that they could impose their own personal policy preferences to ensure that no permits would be issued for the Project and they could stop sister states from exporting their products into foreign commerce.

Washington officials just wanted to stop the project and thought that they were successful by denying the 401 water quality certification. After denying the 401 certification with prejudice, Millennium continued working with local, state and federal agencies on other permits for the Project, confident that it would eventually secure those permits and the 401 certification. However, when Millennium's consultants engaged Washington Ecology staff, asking for technical assistance and for their cooperation with other regulatory agencies that continued to process Millennium's permit applications, Director Bellon wrote Millennium that its "staff will not be spending time on permit preparation related to Millennium's additional applications for the [Project]."[6]

Director Bellon's letter undermined Millennium's permitting efforts across the board for the Project because much of the requested technical assistance related to permits from other agencies besides Washington Ecology. Washington Ecology refused to provide assistance to these other agencies in an effort to ensure that the Project died. Instead, Washington Ecology told Millennium to direct "questions regarding future permit applications" to the Washington Attorney General's office. This direction was a not-so-veiled message to Millennium that the Project was not going to ever be built, at least with any cooperation from the State of Washington.

Not content with issuing the 401 Denial Order, Washington Ecology even sought to prevent the US Army Corps of Engineers from continuing its work on the NEPA EIS. In September 2018, Director Bellon sent a letter to the Army Corps asking them to shut down its separate federal environmental review process. She twice expressed "deep concern" over the Army Corps' decision to "work on the federal permitting process . . ."[7], especially after Washington Ecology had already done everything in its power to stop the Project.

Washington Ecology's 401 Denial Order with prejudice was remarkable for a number of reasons in that nearly every aspect of the denial is unprecedented. Washington Ecology had never before, and has never since:

- Denied a 401 water quality certification for non-water quality reasons, including any reason resembling those cited in the 401 Denial Order;
- Denied a Section 401 water quality certification with prejudice;
- Denied any permit or certification of any kind based on SEPA's substantive authority to deny permits;
- Issued a denial order signed by the director;
- Required the volume or type of water quality information for a 401 certification application; and

[6] Letter from Maia Bellon to Millennium, October 23, 2017.

[7] Letter from Maia Bellon to Colonel Mark Geraldi, U.S. Army Corps of Engineers, September 10, 2018.

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- Told a project proponent that it would not provide any further assistance on a project moving forward, and to contact the state attorney general's office for further questions.

The 401 certification process should not be abused. Accordingly, Lighthouse encourages EPA to promulgate the Proposed Rule in full, in order to keep the 401 certification process consistent with the Clean Water Act.

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November 19, 2019

The Honorable John Barrasso
Chairman
Committee on Environment
& Public Works
United States Senate
Washington, D.C. 20510

The Honorable Tom Carper
Ranking Member
Committee on Environment
& Public Works
United States Senate
Washington, D.C. 20510

Dear Chairman Barrasso and Ranking Member Carper:

I am writing to you on behalf of the Portland Cement Association (PCA) in support of the hearing entitled, "*Hearing on S. 1087, the Water Quality Certification Improvement Act of 2019, and Other Potential Reforms to Improve Implementation of Section 401 of the Clean Water Act: State Perspectives.*" This hearing is necessary as it seeks to evaluate how the federal government can balance environmental protection with the necessity for manufacturers and communities to have access to reliable energy.

PCA, founded in 1916, is the premier policy, research, education, and market intelligence organization serving America's cement manufacturers. PCA members represent 92 percent of the United States' cement production capacity and have distribution facilities in every state in the continental U.S. Cement and concrete product manufacturing, directly and indirectly, employs approximately 610,000 people in our country, and our collective industries contribute over $125 billion to our economy. Portland cement is the fundamental ingredient in concrete. The Association promotes safety, sustainability, and innovation in all aspects of construction, fosters continuous improvement in cement manufacturing and distribution, and promotes economic growth and sound infrastructure investment.

Portland cement is not a brand name, but the generic term for the type of cement used in virtually all concrete. Concrete forms when portland cement is mixed water, and aggregate (sand and rock), and allowed to harden. Cement holds the concrete together and has a role similar to flour in a cake mix. Concrete is the most-utilized material after water in the world; the U.S. uses about 260 million cubic yards of concrete each year. It is used to build highways, bridges, runways, water & sewage pipes, high-rise buildings, dams, homes, floors, sidewalks, and driveways.

Cement, the essential material to make concrete, is manufactured through an energy-intensive process. The heart of the process is the cement kiln, a large rotating industrial furnace in which limestone (the critical raw ingredient) and other materials are heated to 3,500 degrees Fahrenheit. At this temperature, the materials become molten and then recombine into small stones called clinker, which is then conveyed to mills to be crushed into the final cement powder.

The cement industry depends upon significant quantities of fuel to make cement. While we have reduced energy use from 7.8 gigajoules (GJ) per ton of clinker in 1972 to 4.6 GJ per ton in 2016, the process still depends upon large and stable fuel supplies for combustion. Further, the cement industry uses a wide variety of fuels, natural gas, coal, and secondary materials like tires to achieve the high temperatures necessary to create portland cement. PCA supports flexibility for fuel sources, with manufacturers able to pick the best source for their circumstances. Any changes to the permitting policies for pipelines could harm our members. Natural gas is one of the most widely used fuel sources, with it having a 15.5% share of fuels. As with any fuel or material used in the production process, we depend upon a stable supply and price to bring our product to the marketplace.

Under the Clean Water Act (CWA), manufacturers, utilities, and natural gas suppliers must get a permit through the National Pollutant Discharge Elimination System (NPDES) to operate in many circumstances. The CWA requires through Section 401 a certification by states potentially impacted by the permit that the project will not harm the state's water quality. While well-intentioned, Section 401 has increasingly been abused by some states to prevent the construction of projects for energy transmission, such as natural gas. Some states have applied an expansive view of Section 401 to block and delay pipeline construction, even when there are no water quality impacts from the project. Such projects are significant to the sustainability and economic goals for the country, and misuse of Section 401 impedes worthy goals without necessarily improving water quality.

PCA supports the Committee's efforts to evaluate state use of Section 401 of the Clean Water Act, and if any statutory changes are necessary to modernize it. We appreciate the opportunity to share our member's perspective on the Clean Water Act. We look forward to working with the Committee on legislation and agency oversight to ensure our nation's manufacturers continue to have access to a stable and robust energy supply.

Sincerely,

Sean O'Neill
Senior Vice-President, Government Affairs
Portland Cement Associations

SCOTT A. THOMPSON
Executive Director

OKLAHOMA DEPARTMENT OF ENVIRONMENTAL QUALITY

KEVIN STITT
Governor

December 2, 2019

Chairman John Barasso
United States Senate
Committee on Environment and Public Works
410 Dirksen Senate Office Building
Washington, D.C. 20510

Re: Water Quality Certification Improvement Act of 2019

Chairman Barasso:

Thank you for allowing Governor Kevin Stitt the opportunity to speak with you and the Senate Environment and Public Works Committee regarding the Water Quality Certification Improvement Act of 2019 on November 19, 2019. As Governor Stitt stated in his testimony, Oklahoma supports actions taken by EPA and members of your committee to restore certainty to the Clean Water Act permitting process and certification under Section 401.

The current proposed rule, and the opportunity to strengthen it legislatively, would maintain a level playing field without infringing upon a state's ability to protect water quality.

Thank you again for the opportunity to comment on this subject and to discuss the exciting developments in the great state of Oklahoma.

Sincerely,

Scott A. Thompson
Executive Director
Oklahoma Department of Environmental Quality

BULK TERMINALS
millennium
LONGVIEW, LLC

December 4, 2019

VIA E MAIL

The Honorable John Barrasso
Chairman, Senate Environment and Public Works Committee
307 Dirksen Senate Office Building
Washington DC, 20510

The Honorable Tom Carper
Chairman, Senate Environment and Public Works Committee
513 Hart Senate Office Building
Washington DC, 20510

Dear Chairman John Barrasso and Ranking Member Tom Carper:

On behalf of Millennium Bulk Terminals, Longview, LLC, I am writing to correct the record created by the testimony of Laura Watson, Sr. Assistant Attorney General of Washington State, and the Director of the Washington State Department of Ecology ("Ecology"), Maia Bellon, concerning Ecology's denial *with prejudice* of Millennium's application for certification under Clean Water Act ("CWA") section 401, 33 U.S.C. § 1341.

The State's collective testimony insisted that Ecology denied Millennium's section 401 certification because Millennium's project could not meet water quality standards and that statements to the contrary from the company were simply false. Contrary to the State's testimony, nowhere in the State's Denial Order did the State conclude that the Project *could* not meet state water quality standards. To the extent that Director Bellon's testimony reiterated the state's concerns with dredging, filling of degraded wetlands, and tribal resource impacts, the Director neglected to tell the Committee that her own Environmental Impact Statement ("EIS"), which spanned more than 15,000 pages, unequivocally concluded that the project would have no significant adverse environmental impacts on water quality, wetlands, fish and aquatic resources, and surface waters, because any impacts in those areas could be mitigated. As my prior letter of September 12, 2018 explains, statements from Director Bellon and Ms. Watson concerning the so-called "devastating impacts on the Columbia River" are therefore belied by the findings included in the State's own comprehensive EIS.

In addition, Director Bellon and Ms. Watson failed to inform the Committee that the certification denial *with prejudice* was predicated on non-water quality impacts associated with interstate rail

and international vessel traffic. In fact, contrary to Ms. Watson's testimony to this Committee, Ecology's attorneys (supervised by Ms. Watson) and senior agency staff affirmatively testified to the Washington State Pollution Control Hearings Board ("PCHB") that the "*with prejudice*" determination ***was not*** based on the mitigatable water quality impacts discussed in pages 13-19 of the Denial Order.

Ironically, further testimony before the PCHB by Ecology staff confirmed that the unprecedented first-of its-kind Denial Order "with prejudice" was issued to ensure that Millennium would not be given the opportunity to address any of the concerns about so- called missing water quality information identified in the Denial Order. If there were any question about the Director's intentions, they were answered by her letter dated October 23, 2017 to Millennium informing the company that the State had in effect "vetoed" the project based on so called un-mitigatable train and vessel traffic impacts and that agency staff would not be made available to assist with any other permitting in connection with Millennium's coal export project. I have attached a copy of the Director's letter to me for the Committee's convenience.

Finally, contrary to the misleading testimony from Ms. Watson, the State's CWA section 401 abuses led other state and local agencies to deny various permits necessary for the coal project. The County Hearing examiner expressly based his decision to deny the company a permit under the Shoreline Management Act on Director Bellon's section 401 certification denial, demonstrating the continuing harm these extraordinary abuses have had on the Project as a whole. For these reasons, Millennium continues to support the efforts of this Committee to pass legislation that would prevent state agencies from mis-using the authority provided by the certification process established in CWA section 401.

Very truly yours,

Kristin Gaines
Sr. Vice President
Millennium Bulk Terminals- Longview

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STATE OF WASHINGTON
DEPARTMENT OF ECOLOGY
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711 for Washington Relay Service • Persons with a speech disability can call 877-833-6341

October 23, 2017

Kristin Gaines
Millennium Bulk Terminals – Longview
4029 Industrial Way
Longview, WA 98632

RE: Point of Contact for Communication between Millennium Bulk Terminals-Longview and Washington State Department of Ecology

Dear Ms. Gaines:

This letter responds to recent requests the Department of Ecology (Ecology) has received regarding technical assistance for additional permit applications for the Millennium Bulk Terminal–Longview (Millennium) proposed coal export terminal. One request came from Millennium's consultant at American Multinational Engineering Firm related to an air quality permit application, and the other request was from the Millennium team related to a National Pollutant Discharge Elimination System permit application.

As you know, on September 26, 2017, Ecology denied the Section 401 Water Quality Certification requested by Millennium. The denial of this permit was based on the Clean Water Act and the State Environmental Policy Act.

In considering future permit requests from Millennium for the proposed coal export terminal, Ecology would be required to follow all relevant underlying laws. Specifically, the State Environmental Policy Act would require consideration of the findings of the April 28, 2017, Final Environmental Impact Statement (EIS) prepared by Cowlitz County and Ecology. The EIS identified the following nine unavoidable, un-mitigatable and adverse impacts related to the Millennium proposal:

- Increases of train-related noise to residences near four public at-grade crossings along the Reynolds Lead and BNSF Railway spur.
- Vehicle delays caused by increased train traffic that would block rail crossings in Cowlitz County.
- An increase in cancer risk for areas along rail lines near the project site and in Cowlitz County from increased diesel emissions primarily from trains.

- Impacts to the Highlands neighborhood, a minority and low-income neighborhood adjacent to the Reynolds Lead in Longview, Washington from increases of noise, vehicle delays, and inhalation cancer risk from diesel particulate matter.
- Exceedances of rail line capacity at three rail segments on the main line from adding 16 trains a day to Washington rail traffic.
- An increase to the train accident rate by 22 percent along the rail routes in Cowlitz County and Washington from Millennium-related trains.
- Increases to vessel related emergencies and vessel accidents from Millennium-related vessels.
- Demolition of the Reynolds Metals Reduction Plant Historic District.
- Delayed access to 20 managed tribal fishing sites along the Columbia River from increased rail traffic, and impacts to tribal resources from the construction and operation of the proposed facility on aquatic resources.

Although Ecology cannot prevent Millennium from filing future permit applications for the proposed coal export terminal, these EIS findings likely preclude Ecology from approving such applications. Therefore, at this time, Ecology staff will not be spending time on permit preparation related to Millennium's additional applications for the coal export terminal.

If you have any questions regarding future permit applications, please direct those questions through your attorneys to Mr. Tom Young at the Washington Attorney General's Office. Additionally, Mr. Young will serve as Ecology's point of contact in regard to the legal challenge that Millennium has indicated it will file against Ecology, regarding the denial of the Section 401 Water Quality Certification.

Sincerely,

Maia D. Bellon
Director

cc: Tom Young, Attorney General's Office

Comments of the Environmental Defense Fund on Con Edison's Gas Moratorium– NYSPSC 2/13/19

Good afternoon. I am Jonathan Peress, Senior Director of Energy Market Policy for the Environmental Defense Fund. Our motto is "Finding the Ways that Work," and doing so is the focus of my comments. We have extensive expertise in wholesale natural gas markets and gas supply matters such as those that are pending in New York in the present. In that vein, we regularly compile data regarding pipeline utilization and deliveries across the Atlantic seaboard.

Our data strongly support the conclusion that there is a natural gas supply problem in the downstate area including New York City and its suburbs. Our data demonstrate that those supply constraints, and they are pipeline supply constraints, are causing adverse environmental impacts.

As a result of those adverse environmental impacts, our data suggest that opposing or preventing all new pipeline capacity expansion projects into New York is not an effective climate policy, particularly if that proposed capacity is right sized. Let me repeat that: opposing or preventing all pipeline capacity expansion into New York is not an effective climate policy.

I appreciate why some of my colleagues in the environmental community pursue that approach. In general, the pipeline operators assert that they are part of the climate solution but they are reluctant to provide the data or undertake the greenhouse gas analysis to assess whether they are or are not. In my experience, there are projects that facilitate achieving short term and long term climate policy goals, and there are projects that pose

obstacles to such achievement because they constitute unnecessary overbuild and a pathway to locking in carbon and methane emissions. Broadly speaking, the gas pipelines and their largest customers, the local gas distribution companies, have not provided the tools or the means to assess and weigh climate impacts – good, bad or indifferent. In the absence of meaningful climate assessments, there is some justification for an adverse presumption.

But this should not be a problem in New York. Under Governor Cuomo's leadership, the state has developed and is implementing a comprehensive climate strategy, with goals and specific action items to achieve them. The gas utilities and pipelines have an important role to play in not only achieving climate goals, but also in quantitatively and empirically demonstrating before the fact that their supply arrangements and infrastructure plans are consistent with or contribute to achieving New York's climate goals. That demonstration is incumbent upon the proponents of those supply arrangements, both the regulated utilities whose rate base contracts support pipeline infrastructure and gas supply arrangements, and the infrastructure developers.

In other words, in a state with a comprehensive climate policy like New York, the regulated utilities bear the burden of quantifying the direct and indirect greenhouse gas emissions that are caused by their supply arrangements and the pipeline and storage infrastructure that their rate-based contracts facilitate. And they bear the burden of demonstrating that those arrangements and pipeline infrastructure conform to and are consistent with achieving the State's near term and longer term

greenhouse gas emissions targets. And just as the State of New York has asserted at the federal level, those assessments must use the social cost of carbon as they quantify the climate impacts caused by the state's regulated natural gas utilities.

Our data suggest that in so doing, certain projects can and should foster greenhouse gas reductions, and should be able to demonstrate that they are consistent with New York State climate policy. We know, for example, that due to pipeline constraints at the New York City gates, more dirty #6 fuel oil is burned across the eastern seaboard from New England to Philadelphia on an episodic basis. But we are not prejudging the outcome of these necessary analyses as prepared by project proponents.

EDF stands ready to work with utilities and pipeline developers as they undertake thorough, valid and meaningful greenhouse gas emissions assessments. In our view, such detailed GHG analysis by the utilities and their project developers are compulsory to assess whether gas supply arrangements contribute to solutions or are part of the problem. Our sense from engaging with the relevant utilities and their pipeline developers is that some are more willing than others. The distinctions in their willingness, or lack thereof, to demonstrate whether or not their supply arrangements and proposed pipeline solution contribute to climate solutions, is telling in and of itself.

In this regard, we have been engaging collaboratively with National Grid, as they propose solutions and projects to resolve their city gate supply constraints. Con Edison has to date been somewhat less open to

collaboration as it considers potential supply solutions. Con Edison, please consider these comments as an expression of EDF's willingness to collaborate with you in finding climate appropriate solutions, just as we collaborate with Con Ed on other important initiatives. As I mentioned, we have extensive data and experience addressing gas supply issues.

A final comment on utility planning. In our engagement with Con Ed, they consistently assert in writing and on the record, that their ongoing supply planning is confidential, behind closed doors and only should involve the Commission the Department and Con Ed. Well, it is clear from the moratorium that such black box planning has failed. In legal terms, this is res ipsa loquitur, the result (the moratorium) speaks for itself.

Con Ed's planning efforts have apparently been insufficient for it meet the longstanding Commission policy that gas utility supply portfolios accommodate customer growth. EDF will engage in Con Ed's recently filed rate case to ensure that its future supply planning efforts are sufficiently transparent and to ensure that its supply arrangements conform to the additional statutory duty borne by every regulated utility: that their rate based and regulated activities are consistent with and advance the state of New York's detailed and well-conceived climate and environmental policies.

We will provide additional specifics and recommendations in written comments on the record regarding thorough, reasonably transparent and effective supply planning in light of the circumstances of the moratorium that has given rise to this hearing.

We urge the Commission to be diligent in executing its statutory oversight duties for utility planning including GHG emissions impacts, and we urge the state and all stakeholders to be open minded in assessing the effects of the necessary expanded supply arrangements, including proposed new city gate pipeline capacity to alleviate the current and worsening gas supply constraints.

We appreciate that the Commission is providing this opportunity for EDF and others to express their views.

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

In the Matter of Staff Investigation into a Moratorium on New Natural Gas Services in The Consolidated Edison Company of New York, Inc. Service Territory	))))	**Case 19-G-0080**

COMMENTS OF THE ENVIRONMENTAL DEFENSE FUND

Pursuant to the New York Public Service Commission's ("Commission") February 7, 2019 Notice of Information Forums and Public Statement Hearings and February 15, 2019 Notice of New Case Number Relating to Moratorium on New Natural Gas Services in the Service Territory of Consolidated Edison Company of New York, Inc. ("Con Edison"), the Environmental Defense Fund ("EDF") respectfully submits these comments regarding Con Edison's January 17, 2019 Notice of Temporary Moratorium regarding new natural gas customers in Westchester County ("Moratorium"). In support thereof, EDF states as follows:

I. INTERESTS OF EDF

EDF is a membership organization whose mission is to preserve the natural systems on which all life depends. Guided by science and economics, EDF seeks practical solutions to resolve environmental problems. EDF uses the power of markets to speed the transition to clean energy resources, and consistent with its organizational purpose is engaged in activities to facilitate cost-effective and efficient energy market designs that encourage investment to modernize the energy grid so that it can support the ongoing deployment of renewable energy resources and energy efficiency. EDF works collaboratively with market participants sharing these goals. Before this Commission, EDF has highlighted the importance of harmonizing the Commission's natural gas policies with the state's ambitious climate goals, urging against

pipeline buildout that undermines drivers for more efficient solutions and imposes long-term economic and environmental costs on ratepayers.[1]

II. COMMENTS

EDF's February 13, 2019 Public Hearing Statement referenced data supporting the conclusion that there are supply constraints in downstate New York and its suburbs which are causing adverse environmental impacts.[2] The purpose of our comments below is to present and explain that referenced data as well as to provide recommendations regarding the need for thorough, reasonably transparent and effective gas supply planning in light of the moratorium.

A. Natural Gas Supply Constraints in New York Are Causing Adverse Environmental Impacts on an Episodic Basis

EDF conducted a detailed analysis of the 2018 cold spell and its impact on New York and New England prices, illuminating the interconnectivity of the natural gas markets in the larger northeast region. As demonstrated below, these data lead to the conclusion that, during periods of constraints, additional New York City gate capacity will relieve price pressure not only in New York but also New Jersey, Pennsylvania, and New England, and thus reduce emissions resulting from resources burning fuel oil.

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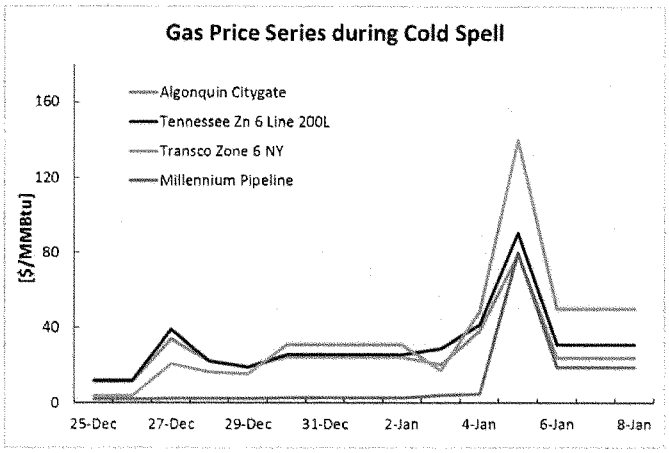
[1] *See, e.g.*, EDF Letter to Secretary Burgess, Heightened Scrutiny of Precedent Agreements Supported by Affiliates, Case 93-G-0932 (November 29, 2016); *Proceeding on Motion of the Commission as to the Rates, Charges, Rules and Regulations of Niagara Mohawk Power Corporation for Electric and Gas Service*, Case 17-E-0238 and 17-G-0239, Testimony and Attachments of Simi Rose George on behalf of the Environmental Defense Fund (August 25, 2017).

[2] EDF's Statement asserts that the proponent(s) of any prospective natural gas supply infrastructure must demonstrate that such infrastructure conforms to, and is consistent with, State climate policy and greenhouse gas reduction goals.

EDF's analysis encompassed numerous market data points from several pipelines and pricing hubs, from the period of December 25, 2017 through January 8, 2018. As shown in the graph below, the most severe price spike occurred on January 5, 2018:[3]



The price spikes felt in New York directly impacted spot market prices in New England, but New York prices remained much higher than New England (compare the January 5, 2018 Millennium hub price of $80/MMBtu and Algonquin City Gate price of $79 to the $140 observed at Transco Zone 6 New York):[4]

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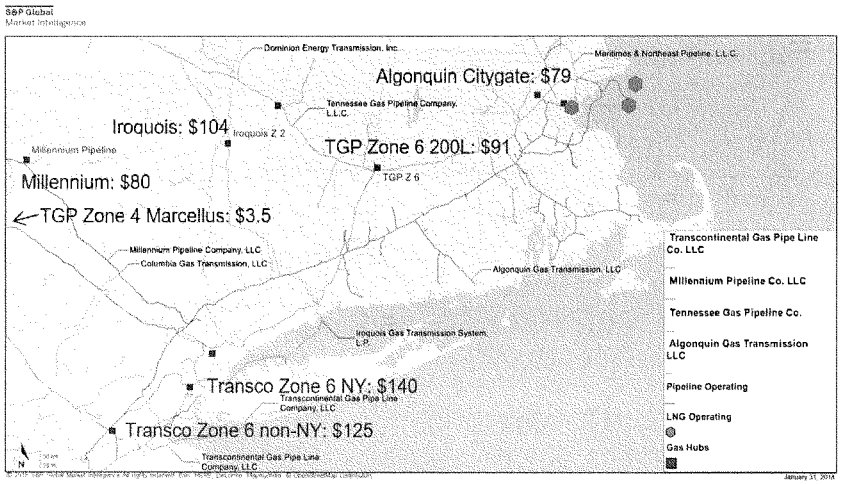
[3] The source of the data is Natural Gas Intelligence's price series, except for Millennium Pipeline, which was obtained from SNL.

[4] All prices listed are from Natural Gas Intelligence's price series, except for Millennium and TGP Zone 4 Marcellus, which are from SNL. All prices reflect the flow date of January 5, 2018.

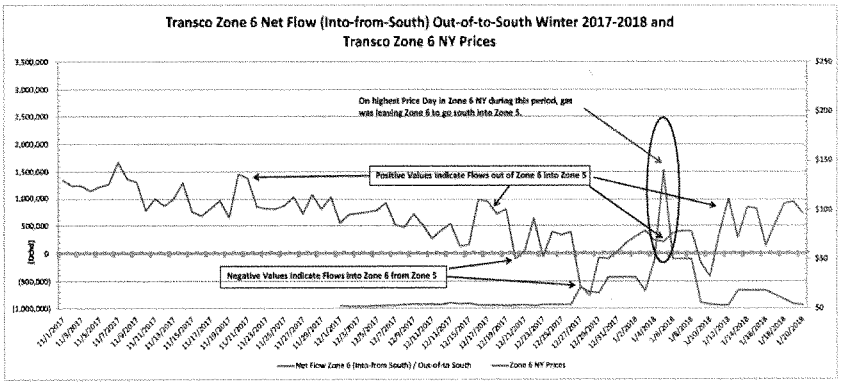


The first key observation from this data is that the extent of Northeast price spikes was driven less by New England pipeline capacity constraints than by New York City demand. This is demonstrated by the Millennium spot price (which serves both New England and New York) reaching a high of $80/MMBtu, as compared to the Algonquin Citygate price of $79. The very small price differential between Algonquin prices and one of its main sources of supply shows that limited Algonquin capacity was not the reason for the January 5 spike in New England gas prices. ISO New England Inc.'s ("ISO-NE") operational analysis confirms that at no time during this event was gas unavailable on the system.[5] Rather, it appears that marketers and asset managers with uncommitted supplies in New England were projecting/selling their available

[5] *See, e.g.*, ISO New England, NEPOOL Participants Committee Report, Cold Weather Operation Questions, (February 2, 2018) (noting that gas resources were called to operate, and were committed, on January 7th).

supplies upstream into New York in order to profit from the arbitrage opportunity owing to the higher prices in the New York market.[6]

The second key observation is that, on an episodic basis, additional New York city gate capacity will relieve price pressure in New York and beyond. The high prices observed in Transco Zone 6 were not related to the availability of gas in Zone 6. This is demonstrated below in the "mass balance" chart for Transco Zone 6. The mass balance chart shows the sum of all scheduled receipts in a particular zone over a time period minus all scheduled deliveries in that zone over the same period:[7]



A positive number indicates there is an excess of receipts in the zone, meaning the gas has to

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[6] For example, increased receipts of vaporized LNG into the Boston market enabled displacement of gas on the Algonquin pipeline into the Iroquois pipeline in Connecticut which then were able to be delivered into the New York City market and sold at higher prices than those available in the Boston Market (i.e., the Algonquin city gate market). *See also* Matthew Oliver *et al.*, Natural Gas Expansion and the Cost of Congestion, International Association for Energy Economics at page 32 (2014) (explaining that non-pipeline owners of firm capacity capture rents in the unregulated secondary market for transportation services).

[7] Greg Lander of Skipping Stone for the New Jersey Conservation Foundation, "Analysis of Regional Pipeline System's Ability to Deliver Sufficient Quantities of Natural Gas During Prolonged and Extreme Cold Weather (Winter 2017-2018) at 7 (February 11, 2018).

leave Zone 6 and proceed to Zone 5. Even on the day of highest prices, there was net southward export of Zone 6 receipts to Zone 5, suggesting that the root cause of the highest New York price was not related to the availability of gas in Zone 6. Rather, the data suggest the price spikes were the result of the inability of New York City to receive supplies from Transco at the pertinent Transco Zone 6 NY pricing locations.[8]

The third key observation is that due to pipeline constraints between the Transco Zone 6 Non-NY pricing location and the New York City gates (i.e., the Transco Zone 6 NY pricing locations), more of the dirtier fuel oils have been and will be burned across the eastern seaboard on an episodic basis. As reported by ISO-NE in its cold weather operations analysis, generator oil burn during the 15 days that comprised the Winter of 2017/2018 cold spell vastly exceeded oil amounts burned in all of 2016, as well as in all of 2017 prior to the cold snap (i.e., from January 1, 2017 to December 24, 2017):[9]

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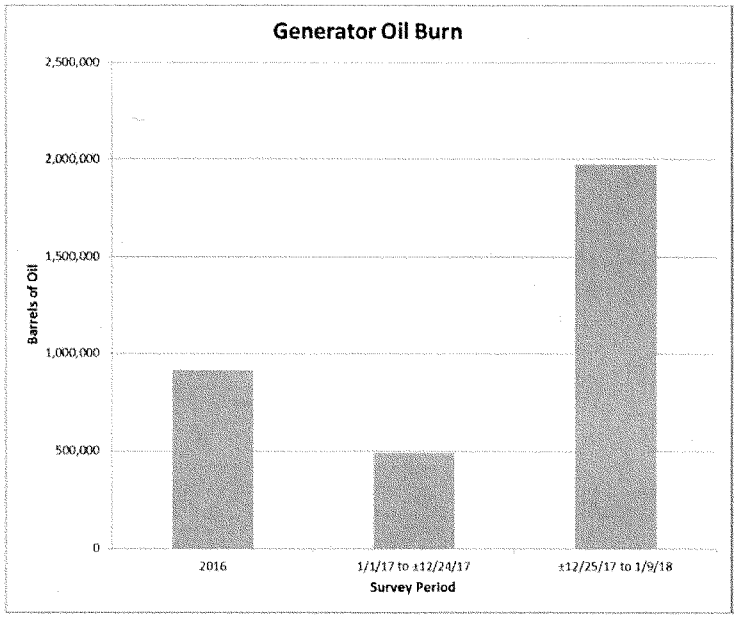
[8] *Id.* at 7-8.

[9] ISO New England, Cold Weather Operations December 24, 2017 – January 8, 2018 at slide 18 (January 12, 2018).



This increased oil burn dramatically shifted the resource mix of ISO-NE, with oil comprising 27% of the resource mix during the cold snap—because oil was less expensive than natural gas. The data suggest that high prices being experienced at the New York City gates caused a market reaction whereby the cost of supply increased across the northeast and into New England. The higher supply prices affected the relative economics for fuels used by electric generators with the net result being an increased oil burn, and consequently emissions:[10]

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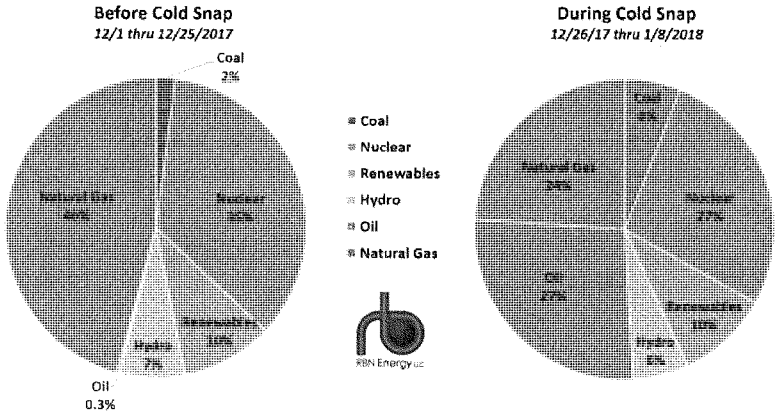
[10] New England burns more residual (#6) oil than distillate (#2) oil. https://www.eia.gov/dashboard/newengland/electricity (showing more residual fuel oil than distillate oil held in stock for electric generation in New England). Residual oil has significantly higher emissions than natural gas. Institute for Policy Integrity, More Residual Risks: An Update on New York City Boilers at 2 (May 2010) (comparing emissions by fuel type), https://policyintegrity.org/files/publications/More_Residual_Risks.pdf. Therefore, increased oil use during extreme cold weather episodes leads to significant increases in air emissions. As reported by ISO-NE, "with extended days of burning oil, several resources



These data are also validated by the Eastern Interconnection Planning Collaborative's Gas-Electric System Interface Study, the purpose of which was to evaluate the adequacy of the interstate gas pipeline network to meet the coincident peak demands of local distribution companies. Regarding the New York region, the study observes:

> During the winter peak hour, nearly all pipelines in New York – Constitution, Empire, Dominion, Millennium, and Tennessee – run at 100% capacity to serve RCI loads in New York, New England, and Ontario. Constrained Transco segments in PJM also affect downstream New York generators. The quantity of affected gas-fired generation is reduced, but not eliminated, when high daily spot market gas prices place oil-fired generation, and, to a much lesser extent, coal-fired generation, in merit.[11]

In sum, episodic natural gas supply constraints in the downstate area including New York City and its suburbs are causing adverse environmental impacts.

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either had concerns about hitting federal and/or state emissions limitations or were impacted by emissions limitations." ISO New England, Cold Weather Operations December 24, 2017 – January 8, 2018 at slide 23 (January 12, 2018).

[11] Eastern Interconnection Planning Collaborative, Gas-Electric Interface Study Target 2 Report at page iv (March 9, 2015).

B. Significant Changes are Needed to Ensure Con Edison's Supply Planning is Effective and Transparent

This proceeding has illuminated the deficiencies in the current natural gas supply planning processes. As described by Con Edison, the current process is essentially a black box exchange between Staff and the Company.[12] Despite the fact that both Con Edison's 2010 Gas Long Range Plan[13] and 2016 rate case testimony[14] identified the need for construction of new interstate pipeline capacity, nearly a decade later, Con Edison has yet to address the need (or even propose a project), forcing the Company to announce a moratorium. The moratorium not only highlights the deficiencies of Con Edison's gas supply planning but also demonstrates the insufficiency of the state-wide processes that should be in place to protect against such occurrences.

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[12] Letter from Con Edison to EDF re: EDF Request for Heightened Scrutiny of Precedent Agreements Supported by Affiliates, Case No. 93-G-0932 (December 27, 2016) (explaining that the Company submits "myriad redacted material" in response to Staff's inquiries on various gas supply matters).

[13] Con Edison, Gas Long Range Plan, 2010-2030 at page 91 (December 2010), http://158.57.189.31/publicissues/PDF/GLRP1210e.pdf ("Con Edison recognizes that there is a need for the construction of new interstate pipeline capacity to serve growing demand for natural gas in the New York metropolitan area. Given the high utilization level of existing interstate pipeline capacity in the region, new pipeline capacity must be developed. Con Edison supports the construction of new interstate pipeline capacity.").

[14] Ivan Kimball Gas Supply Testimony, Case No. 16-G-0061 at page 21, line 22 to page 22, line 9 (January 29, 2016) ("Our projected demand growth over the next few years indicates a need for new pipeline capacity to the NYC region. There are two means for meeting our demand: (1) either procure additional capacity from existing capacity holders or (2) become a shipper on new pipeline projects to the NYC citygates. Because of the limited availability of unsubscribed capacity on existing pipelines, and the long lead time of new pipeline projects to the citygate, the Company has started to explore and evaluate potential pipeline projects that come to the NYC region.").

EDF has repeatedly asked the Commission to harmonize its natural gas policies with the State's ambitious climate goals.[15] At the same time that the State has promulgated aggressive 80 by 50 greenhouse gas emission goals, the policy framework relating to gas supply and expansion has remained static. These older policies were adopted when gas was viewed as a cost-effective and cleaner alternative to alternatives such as oil and kerosene, while its environmental downside was unknown or unacknowledged. For instance, the Commission's 2012 Policy Statement[16] on natural gas is still a significant driving force in Staff's review of utility gas supply plans—where Staff asks utilities to detail all expansion projects, and if there are none, how this is justified "given the Commission's stated goal of expanding the natural gas system in New York State."[17] These policies do not even begin to grapple with how gas supply planning and infrastructure decisions will be consistent with the State's climate goals.[18] This disconnect must be addressed as the State revisits the sufficiency of its existing programs, policies, and procedures.

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[15] *See, e.g.*, Comments of the Environmental Defense Fund, Case No. 17-G-0606 at pages 2-4 (January 22, 2018).

[16] Proceeding on Motion of the Commission to Examine Policies Regarding the Expansion of Natural Gas Service, Order Instituting Proceeding and Establishing Further Procedures, Case No. 12-G-0297 (November 30, 2012).

[17] Con Edison Winter Supply Review Data Request, Case No. 18-M-0272 at page 26 (July 16, 2018).

[18] According to the latest version of the State's 2015 greenhouse inventory, total GHG emissions in 1990, the baseline year for the 80x50 goal, were about 238 million metric tons of CO2-equivalent. An 80% reduction by 2050 would mean that less than 48 million metric tons of CO2-equivalent could be emitted in that year. And in 2015, GHG emissions associated with natural gas totaled over 76 million metric tons CO2-equivalent – already far more than the 48 million metric tons that can be allowed economy-wide in 2050. *See* New York State Greenhouse Gas Inventory: 1990-2015 (Final Report, Revised September 2018), Table S-2 at S-8 and S-9 and Figure S-4 at page S-7.

The Commission has the opportunity in this proceeding to address these deficiencies by:

- ***Demanding transparent and comprehensive information from Con Edison.*** As demonstrated by the moratorium, the current black box approach to gas supply planning is deficient. Con Edison and other utilities should be required to submit comprehensive and transparent information regarding their gas supply needs, including whether any pipeline projects will be supported by affiliated midstream developers. At a minimum, interested stakeholders should have access to this transparent and comprehensive information—as recently acknowledged by the Commission.[19] Submitting information on a piecemeal basis in the Smart Solutions docket and in rate cases is not a sufficient substitute for this comprehensive submission.

- ***Holistically analyzing the impact of new infrastructure in and to New York City on Con Edison's supply needs.*** There are currently proposed projects that would increase capacity into New York City, such as the Northeast Supply Enhancement Project. This project and others could impact the amount of delivered services available to Con Edison, which in turn could decrease or eliminate the need for additional infrastructure into New York City. The Commission should holistieally evaluate New York City's needs to understand the interdependencies between National Grid and Con Edison's systems to ensure that any new pipeline capacity is right-sized for the region.

- ***Obligating Con Edison to explicitly consider the impact of current and future State and City policies on its prospective demand and supply needs.*** Most critically, if Con Edison intends to propose natural gas supply infrastructure, it must demonstrate that such infrastructure conforms to and is consistent with State climate policy and greenhouse gas reduction goals. Future City policy goals should also be taken into account in the utility's planning efforts. For example, if the City adopts greenhouse gas reduction mandates for buildings, this will drive accelerated electrification and will impact gas capacity needs and uses.

- ***Requiring utilities to engage in more robust and transparent supply planning efforts, including the requirement to consider non-pipeline alternatives as part of a utility's long-term gas supply plans***. Refinements to the gas supply planning process should also include consideration of non-pipeline alternatives, which should be integrated into utilities' formal planning and needs assessments. Identifying and assessing non-pipeline alternatives outside of a company's formal planning and needs assessment will tend to diminish deployment and could present missed opportunities to better align natural gas policy with the state's ambitious climate goals.

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[19] Petition of Consolidated Edison Company of New York, Inc. for Approval of the Smart Solutions for Natural Gas Customers Program, Order Approving with Modification the Non-Pipeline Solutions Portfolio, Case No. 17-G-0606 at 35 (February 7, 2019) ("Gas supply constraint solutions will need to involve greater visibility of the distribution planning process to stakeholders and local communities, to enable joint problem solving").

- ***Addressing the shortcomings of the Benefit Cost Analysis Framework by using a newly proposed paradigm, the Resource Value Framework, to develop a Benefit Cost Analysis Framework that supports New York State's policy environment.*** Using the Resource Value Framework to refine the Benefit Cost Analysis Framework would ensure that values relevant to achievement of the State's climate goals would be included in the analysis that is to be deployed when assessing the cost-effectiveness of new gas infrastructure. For further explanation and support for this issue, please refer to EDF's January 7, 2019 Comments in Case No. 17-G-0606 at pages 14-15.

III. CONCLUSION

Wherefore, the Environmental Defense Fund respectfully requests that the Commission consider the foregoing comments in taking any action in this docket.

Dated: February 28, 2019

Respectfully submitted,

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THE HONORABLE ROBERT J. BRYAN

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

LIGHTHOUSE RESOURCES INC.; LIGHTHOUSE PRODUCTS, LLC; LHR INFRASTRUCTURE, LLC; LHR COAL, LLC; and MILLENNIUM BULK TERMINALS-LONGVIEW, LLC,

Plaintiffs,

and

BNSF RAILWAY COMPANY,

Plaintiff-Intervenor,

vs.

JAY INSLEE, in his official capacity as Governor of the State of Washington; MAIA BELLON, in her official capacity as Director of the Washington Department of Ecology; and HILARY S. FRANZ, in her official capacity as Commissioner of Public Lands,

Defendants,

and,

WASHINGTON ENVIRONMENTAL COUNCIL, COLUMBIA RIVERKEEPER, FRIENDS OF THE COLUMBIA GORGE, CLIMATE SOLUTIONS and, SIERRA CLUB,

Defendant-Intervenors.

NO. 3:18-cv-05005-RJB

DECLARATION OF ELAINE PLACIDO, DIRECTOR OF COMMUNITY SERVICES, COWLITZ COUNTY

LAW OFFICES
GORDON THOMAS HONEYWELL LLP
1201 PACIFIC AVENUE, SUITE 2100
TACOMA, WASHINGTON 98402
(253) 620-6500 - FACSIMILE (253) 620-6565

I, Elaine Placido, pursuant to 28 U.S.C. § 1746, do hereby state and declare as follows:

1. My name is Elaine Placido, and I am the Director of Community Services at the Department of Building and Planning for Cowlitz County, Washington. I am over the age of 18 years and competent to testify in all respects.

2. I have worked in permitting and environmental review for eight years. I have worked at the Cowlitz County Department of Building and Planning since 2011, and I have been the Director since July 2013. Prior to my role as Director, I was the Operations Manager at the Cowlitz County Department of Building and Planning. I have a doctorate in Public Administration from Valdosta State University.

3. As Director, I led or co-led preparation of three Environmental Impact Statements for projects in Cowlitz County. I routinely review and issue a variety of state and local permits including shoreline permits, conditional use permits, and critical areas permits. I'm familiar with state and local impact evaluation, mitigation, and permit decision-making processes, including State Environmental Policy Act (SEPA) review. I've led, co-led, or participated in hundreds of SEPA reviews. I also routinely work with the Washington State Department of Ecology (Ecology) on permitting and environmental review.

4. I am very familiar with the proposed Millennium Bulk Terminals-Longview (Millennium) coal export terminal (the "Terminal") and have been personally involved with the environmental review and permitting of the Terminal since 2013. When I became Director in 2013, Cowlitz County and Ecology had just started work, as co-lead agencies, on a SEPA Draft Environmental Impact Statement (DEIS) for the Terminal. As Director, and as the Cowlitz County (the County) SEPA responsible official, I was directly involved in the process of drafting and approving the DEIS, which was published for public comment on April 30, 2016, and the subsequent Final Environmental Impact Statement (FEIS), which was published

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on April 28, 2017. I worked directly with Ecology and ICF International, Inc. (ICF), the environmental consulting firm contracted to help prepare the DEIS and FEIS for the Terminal.

5. I was personally involved with virtually all of the important documents, communications, meetings, and decision-making associated with the DEIS, FEIS, and environmental review of the Terminal.

6. During the DEIS and FEIS process, Millennium was responsive, timely, and engaged. They provided requested information quickly and if they couldn't, they worked with the Co-Leads to explain why and provide what they could, when they could.

7. Based on my experience working on the DEIS and the FEIS, the Ecology project team openly agreed that each of the impacts *potentially* caused by the Terminal were avoidable and subject to reasonable mitigation.

8. Under Ecology's instruction, in many respects the DEIS and FEIS documents present worst-case scenario analyses. It is therefore misleading for Ecology in its 401 decision to point to the FEIS as presenting findings that *would* occur if the Terminal were built, as opposed to presenting those findings as ones that *could* occur.

9. Also, insofar as Ecology's decision to deny Millennium a 401 water quality certification (the 401 Denial) relies on the FEIS, the decision is inconsistent with the FEIS and Ecology's agreements to the findings in the FEIS. For example, the FEIS described "potential" rail transportation, rail safety, and vehicle transportation impacts that "could" occur because Ecology, the County, and ICF deliberately decided that language—and not something else—appropriately describes the uncertainty of the described impacts.

10. Based on my experience working on the FEIS, I can only conclude that those aspects of the 401 Denial relying on the FEIS are pretext, and that the real reason for the permit denial is to further unstated State policy preferences. I am unaware of any other instance in

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which Ecology or another state agency denied a permit based on potential impacts similar to those outlined in the FEIS. I believe that if these indirect impacts were truly significant and not mitigable, then state and local agencies would be forced to deny all manner of port, shipping, and transportation permits.

11. The FEIS uses a very conservative approach which overstates the potential environmental impacts caused by the Terminal. For the Terminal's SEPA review, Ecology was the "co-lead" with Cowlitz County. In actual practice, however, Ecology and their partner state agencies dominated the lead role, the SEPA process, and the decision making regarding the "significance" findings in the FEIS (that is, whether potential environmental impacts were significant, avoidable, or able to be mitigated), especially in areas where they claimed a statewide interest. Ecology routinely sidelined the County during meetings and decision-making, including on the significance findings. Ecology also ignored issues I raised about overly broad impact review, held meetings with tribal groups and the Defendant-Intervenors without inviting any County representatives, and directed ICF work without first consulting me or my staff, particularly on areas of statewide interest.

12. I also witnessed Ecology disagree with ICF staff members such as Linda Amato and Darren Muldoon, who were the former ICF leads on the DEIS and FEIS for the Terminal, and who were responsible for the team that conducted the technical analyses supporting the DEIS and FEIS. In those instances, ICF personnel disagreed with Ecology over the significance findings that Ecology wanted to draw in the chapters of the FEIS. Sally Toteff, the SEPA responsible official for Ecology, eventually pushed the County and ICF to replace Ms. Amato as project manager after several heated discussions between her and Ms. Amato regarding the DEIS. Ecology ultimately deemed that it alone would make significance findings, though in some instances after ICF personnel disagreed with those findings, Ecology

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changed them. I witnessed Ecology treat Millennium more like an adversary than a permit applicant throughout the environmental review process, and especially as it drew to a close and moved into the permitting phase.

13. Ecology did not consult the County before denying Millennium's section 401 certification application with prejudice. As co-author and co-lead of the FEIS, I did not expect Ecology to deny Millennium's 401 certification request. Despite regular County-Ecology meetings after publication of the FEIS, Ecology never consulted the County about the 401 Denial. When I signed the FEIS on behalf of Cowlitz County, my analysis and my staff's analysis was that the FEIS describes a project that satisfies all applicable state and local laws. I was surprised that Ecology denied the 401 certification request with prejudice, and I believe that if Millennium proposed to ship anything other than coal, Ecology would have granted the Section 401 water quality certification. In short, my staff's analysis and my analysis is that the FEIS describes a fully permittable project.

14. In the 401 Denial, Ecology distorts the FEIS findings. To deny a permit under SEPA, a proposal must be *likely* to result in significant adverse environmental impacts—identified in an environmental impact statement—for which reasonable mitigation measures are insufficient to mitigate those impacts. The FEIS, which I signed with Ecology, does not make those kinds of findings. The 401 Denial discounted the expected, planned, and likely mitigation available for potential environmental impacts and interpreted the FEIS findings to make it appear that the FEIS had determined that certain environmental impacts, including indirect impacts outside the control of the applicant, were definitively significant and unavoidable when they were not.

15. More specifically, the 401 Denial recasts multiple FEIS potential impacts that "could" occur as impacts that "would" occur. These are unjustified changes from language that

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even Ecology previously agreed upon. This is an after-the-fact re-write of the FEIS. Throughout the DEIS and FEIS process, the County emphasized to Ecology that it was only comfortable describing the impacts as the FEIS does: emphasizing their contingent and uncertain nature. "Would" describes the impacts far more certainly than the Co-Leads intended and does not accurately describe the FEIS's analysis. Impacts that "could" "potentially" occur are very different than impacts that "would" occur. This is a material difference. There was, to my knowledge, no post-FEIS investigation, analysis, or additional fact-gathering that supports the 401 Denial's conclusions. Had Ecology sought to describe the FEIS impacts as the 401 Denial does, I would not have signed the FEIS.

16. The FEIS's conservative, over-stated, worst-case scenario air quality analysis does not describe reasonably likely impacts. Ecology finalized the FEIS's new air quality findings—which radically departed from the DEIS findings—largely independent of ICF and the County. Further, because Ecology finalized the updated air quality analysis shortly before release of the FEIS, as part of the FEIS process, Millennium did not have a legitimate opportunity to present types of mitigation available for this potential impact caused by project-related locomotives. Neither Millennium nor BNSF were made aware of this new FEIS impact analysis before release of the document.

17. As another example, the 401 Denial's vehicle transportation findings depart from the FEIS's findings. The FEIS appropriately determined that vehicle transportation impacts *could* result, but are not likely because of planned improvements. By ignoring these "planned," reasonably likely improvements, Ecology's 401 Denial reaches a wholly different conclusion than the FEIS. The FEIS does not describe reasonably likely vehicle transportation impacts that "would" occur.

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18. Another example is that Ecology's 401 Denial noise and vibration findings also depart from the FEIS findings the County signed. The FEIS found that significant and adverse noise impacts would occur *only if a quiet zone is not implemented.* As the FEIS says, the County plans on working with Millennium to establish a quiet zone, and Millennium would fund the necessary infrastructure to establish a quiet zone. I have no reason to believe a quiet zone cannot or will not be implemented, and no facts were developed during the DEIS or FEIS process that would prevent establishment of a quiet zone. Ecology altered the FEIS findings on noise and vibration in its 401 Decision. The FEIS states that the Terminal is not reasonably likely to create significant and adverse noise and vibration impacts that cannot be mitigated.

19. Ecology's 401 Denial misrepresents the FEIS's rail transportation analysis, too. In the 401 Denial, Ecology states that the Terminal "would" result in significant rail transportation impacts. This is inconsistent with the FEIS. As the FEIS states, it is "expected" that BNSF will make improvements to rail infrastructure that will mitigate these potential impacts. No facts were developed in the FEIS process to suggest otherwise. The Terminal is not reasonably likely to result in significant and adverse rail transportation impacts that cannot be mitigated.

20. Nor do the FEIS and 401 Denial rail safety analyses align. Ecology fully discounts FEIS mitigation findings and recasts key language. During the environmental review process, the Co-Leads commissioned a worst-case scenario analysis to learn the potential accident rates that could occur in the event that the Terminal were built. During that analysis, we learned that BNSF, Union Pacific, and Longview Switching Company (LVSW) planned on making track improvements to accommodate Terminal-related rail traffic, which would improve rail safety. That finding is reflected in the FEIS, which as a result, determined that significant adverse impacts "could" occur in light of the conservative, worst case scenario-type analysis

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and the unlikely event that BNSF, UP, or LVSW somehow were prevented from completing the improvements. But the 401 Denial departs from the FEIS's analysis, instead stating that the Terminal "would" negatively impact rail safety. This is inconsistent with the FEIS. The analysis does not show that adverse rail safety impacts "would" occur.

21. Ecology's vessel transportation finding is also inconsistent with the FEIS. The FEIS found that the risk of a serious vessel-related incident is "very low" but no mitigation measures can "completely eliminate the possibility of an incident." This describes any and every vessel-related project in Washington State. But the 401 Decision refashions the FEIS's vessel transportation findings, changing the FEIS's conclusion that the risk of a serious vessel accident is "very low" to simply "low." Yet the FEIS found that vessel-related incidents are exceptionally unlikely; for example, the FEIS concludes the likelihood of a project-related allision is one every *39 years*. The FEIS intentionally describes vessel-related risks as "very low," and not merely "low." In no case does the FEIS support a finding of a significant, unavoidable, unmitigable adverse impact caused to vessel transportation. Had Ecology insisted on this significant change during the FEIS process, I would not have agreed to it.

22. The 401 Denial's cultural resources analysis, too, does not accurately reflect the FEIS or local reality. Development of the Terminal would redevelop the Reynolds Metals Reduction Plant Historic District, but Ecology did not consider the conclusion that "the Corps *expects* a Memorandum of Agreement [(MOA)] will be signed" that would mitigate this impact. No facts were developed during the DEIS or FEIS process that demonstrated that the MOA would not be signed. It did not occur to me that the MOA would not be signed. The area on which the Terminal would be built is an underutilized brownfield area more than a historic district. And as Ecology is undoubtedly aware, the Corps would require resolution of cultural resource impacts as a condition of any Clean Water Act Section 404 permit. It is

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surprising that Ecology would deny a permit because Millennium proposes to remediate a derelict brownfield site retaining little, if any, of its former historic character, the impacts of which were being further studied in a separate NEPA analysis. The FEIS does not describe reasonably likely cultural resource impacts.

23. The FEIS also does not describe a significant, tribal resource impact. The FEIS explicitly avoided making a determination of significance for tribal resources. And I am unaware of any post-FEIS investigation or analysis that justifies Ecology's departure from the FEIS in this area. In any event, tribal resources are more appropriately analyzed in the federal National Environmental Policy Act review process.

24. Ecology's decision to deny the 401 water quality certification request was especially surprising to me and my staff because the FEIS unequivocally found no unavoidable and significant adverse impacts—potential or otherwise—on water quality. Based on the FEIS, there is no question the company can satisfy all local and state water quality standards. That is what the FEIS concluded.

25. Ecology ignored or discounted mitigation that, as co-author and co-lead of the FEIS, I believe would very likely mitigate or eliminate the impacts identified in the 401 Denial. In my years of experience, I am unaware of any regulatory agency, Ecology included, denying a permit because the regulatory agency argued that expected or planned mitigating circumstances were less than 100 percent certain. Likewise, I am unaware of any regulatory agency rejecting mitigation because it requires an applicant to work with other agencies, obtain additional permits, or contract with a third party. In my experience, many types of mitigation are less than 100 percent certain, and require working with third parties. For example, wetlands mitigation requires identifying available third-party mitigation sites and contracting with those third-parties to obtain mitigation credits. And Ecology accepted Millennium's fish impact

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mitigation, despite it requiring the company to work with third-parties to conduct studies and implement monitoring with non-Ecology agencies.

26. Ecology's stance on mitigation also extended to not giving Millennium the usual and customary treatment that other applicants receive; that is, mitigation is usually built into permits that issue. This is the first time in my career I've seen any regulatory agency wholly exclude an applicant from mitigation discussions. Mitigation is usually the product of the various permit review and approval processes. Air quality mitigation, for example, is usually included in air quality permits, not water quality permits. Here, the County could have addressed Ecology's purported concerns by requiring mitigation in one of the local permits yet to issue for the Terminal. Ecology did not give Millennium the opportunity that usually is provided to other applicants.

27. Based on the above, the 401 Denial for the project is not consistent with the FEIS.

I declare under penalty of perjury that the foregoing is true and correct

Executed on 2/28/19 in Yelm, Washington.

By: _____

Elaine Placido

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Enviro group backs pipelines

By MARIE J. FRENCH 02/19/2019 10:00 AM EST

Editor's Note: This edition of New York Energy is published weekdays at 10 a.m. POLITICO Pro New York subscribers hold exclusive early access to the newsletter each morning at 6 a.m. To learn more about POLITICO Pro New York's comprehensive policy intelligence coverage, policy tools and services, click here.

— **The Environmental Defense Fund** says some pipelines could potentially provide climate benefits in New York.

— **The Mount Vernon Memorial Field** cleanup drags on.

— **PSEG threatens to shut down New Jersey nuclear plants** if the company doesn't get subsidies.

ENVIRONMENTAL GROUP BACKS (SOME) PIPELINES: The Environmental Defense Fund supports new natural gas pipeline capacity for downstate if projects are "right sized" and proponents empirically demonstrate climate benefits, according to comments filed with the Public Service Commission on Con Edison's Westchester County gas moratorium. This is a stark contrast to some activists who want a ban on any new gas power plants or pipelines, arguing that the long-term climate impacts and the state's renewable goals preclude any new fossil fuel infrastructure. "Our data strongly support the conclusion that there is a natural gas supply problem in the downstate area," said

Jonathan Peress in prepared comments for EDF. "Our data demonstrate that those supply constraints, and they are pipeline supply constraints, are causing adverse environmental impacts. As a result of those adverse environmental impacts, our data suggest that opposing or preventing all new pipeline capacity expansion projects into New York is not an effective climate policy." Peress in his comments noted that some utilities, such as National Grid, have been more helpful in collaborating and providing data to demonstrate the greenhouse gas impacts of proposed pipeline supplies. But Con Edison has been more of a "black box," he said. EDF expects to provide more data and detail in forthcoming written comments on the issue. The gas moratorium has sparked serious criticism of the PSC and Con Ed as lawmakers representing the region hear concerns from developers about stifling economic growth. — *Marie J. French*

— **The New York Post blames** Cuomo for Westchester's natural gas supply constraints. The Manhattan Institute's Robert Bryce says the moratorium is a taste of the Green New Deal.

MOUNT VERNON CLEANUP LINGERS — Journal News' Mark Lungariello: "Tons of dirt and debris illegally dumped on Memorial Field years ago remain on site, delaying the start of a multimillion dollar renovation project. The city missed a deadline from New York State to remove the dirt and the latest version of the Mount Vernon budget has no provision to fund the required cleanup. Local political fights over a rebuilding kept the field closed for a decade, but last year Westchester County struck a deal with the city to take over construction once the dirt is removed. County Legislator Lyndon Williams, who helped broker that deal, was frustrated politics was rearing its head again and delaying the project getting started. 'I just want to get this field done, that's my bottom line,' Williams said." Read more here.

PSEG THREATENS NUKE CLOSURES — NJ Spotlight's Tom Johnson: "PSEG Nuclear yesterday rebuked opponents of its bid for lucrative subsidies from ratepayers to keep its three nuclear power plants open, vowing to close the units unless each is awarded financial incentives, beginning as soon as this fall. In a 44-page response filed with the New Jersey Board of Public Utilities, the company said the financial information provided to the agency demonstrated the plants will not cover future costs and risks, and PSEG was thus qualified to receive subsidies of up to $300 million a year. The filing, in fact, suggests the plants could shut begin shutting down prior to refueling outages as early as this fall for Hope Creek, next spring for Salem II, and in the fall of 2020 for Salem I." Read more here.

GOOD TUESDAY MORNING: Let us know if you have tips, story ideas or life advice. We're always here at dunuoio@politico.com and mfrench@politico.com. **And if you like this letter**, please tell a friend and/or loved one they can sign up here.

— **There's a $500 million repair** bill coming due, to fix the sewers in Onondaga County.

— **The Senate will hold a hearing** in Syracuse on the Climate and Community Protection Act this week, the Post-Standard reports.

THE WALL STREET JOURNAL.

https://www.wsj.com/articles/the-u-s-is-overflowing-with-natural-gas-not-everyone-can-get-it-11562518355

GAS MARKETS

The U.S. Is Overflowing With Natural Gas. Not Everyone Can Get It.

U.S. gas production is at a record high, but the infrastructure needed to move the fuel around the country hasn't kept up

By Stephanie Yang and Ryan Dezember

Updated July 8, 2019 12:01 am ET

America is awash in natural gas. In parts of the country there's hardly a drop to burn.

Earlier this year, two utilities that service the New York City area stopped accepting new natural-gas customers in two boroughs and several suburbs. Citing jammed supply lines running into the city on the coldest winter days, they said they couldn't guarantee they'd be able to deliver gas to additional furnaces. Never mind that the country's most prolific gas field, the Marcellus Shale, is only a three-hour drive away.

Meanwhile, in West Texas, drillers have so much excess natural gas they are simply burning it off, roughly enough each day to fuel every home in the state.

U.S. gas production rose to a record of more than 37 trillion cubic feet last year, up 44% from a decade earlier. Yet the infrastructure needed to move gas around the country hasn't kept up. Pipelines aren't in the right places, and when they are, they're usually decades old and often too small.

> The result, despite natural-gas prices that look low on commodities exchanges, is energy feast and famine.

This spring, the price of natural gas at a trading hub near Midland, Texas, dropped as low as negative $9 per million British thermal units—meaning that producers were paying people to take it off their hands. (A million British thermal units is enough to dry about 50 loads of laundry.)

Elsewhere, prices soared due to bouts of cold weather coupled with supply disruptions, including an explosion along a British Columbian pipeline and a leaky underground storage

facility near Los Angeles. At a trading hub in Sumas, Wash., natural gas rose to $200 per million British thermal units in March, the highest ever recorded in the U.S. In Southern California, prices went as high as $23; the average over the winter was a record $7.23.

> The national benchmark, which is set at a knot of pipelines in Louisiana, recently hit a three-year low of $2.19 and has hovered below $3 for much of the year.

"I don't recall a situation when we've had the highs and lows happen in such extremes and in such relatively close proximity," says Rusty Braziel, a former gas trader who now advises energy producers, industrial gas buyers and pipeline investors.

With U.S. homes, power plants and factories using more natural gas than ever, the uneven distribution of the shale boom's bounty means that consumers can end up paying more or even become starved for fuel, while companies that can't get it to market lose out on profits. Around New York City, the dearth of gas has cast uncertainty over new developments and raised fears of stifling economic growth.

One reason for the problem is that pipelines have become political. Proponents of reducing the use of fossil fuels have had little luck limiting drilling in energy-rich regions. Instead, they've turned to fighting pipeline projects on environmental grounds in regions like New York and the Pacific Northwest, where they have a more sympathetic ear.

Even in Texas, the heart of the oil-and-gas industry, new pipelines have started to meet more local resistance. In April, landowners, Hays County and Kyle, a booming city on the outskirts of Austin, sued to block construction of a 430-mile pipeline that would move gas from the West Texas drilling fields, where it is being burned up, to buyers near Houston. The case was dismissed by a Texas judge in June.

Before pipelines

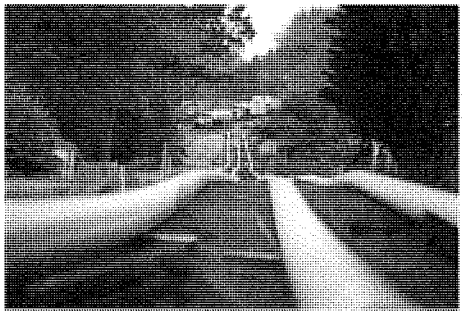
Natural gas, which is often found alongside oil and coal, was once a nuisance to drillers and miners alike. It would send crude shooting up out of wells like flammable geysers and was at risk of exploding in mineshafts. Before the advent of arc-welded pipelines that could be laid over long distances, gas had little value unless it happened to be very close to early industrial cities, like Pittsburgh or Cleveland.

After World War II, energy producers repurposed oil pipelines to ship gas to fuel the hungry furnaces and factories of the Northeast. By the beginning of the 21st century, many thought the U.S. was running out of gas. The national price averaged about $6 over most of that decade and at times rose to more than $12. Pipelines were built to move imported gas from the country's borders, particularly along the Gulf Coast, into the interior.

Then the fracking revolution arrived, flooding domestic gas markets and rendering a lot of supply routes irrelevant. Within a generation, the U.S. has gone from importing gas to becoming a leading exporter.

These days, it's a hassle getting gas from drilling fields like the Marcellus and Utica shales in Appalachia, and the Permian Basin in West Texas, to customers in northern cities. Many pipelines now run the other way: to move gas toward the Gulf Coast, where exporters can usually buy it for less than $3 per million British thermal units, and ship it overseas as liquefied natural gas, or LNG, for higher prices.

A 99-year-old law prevents foreign tankers from shipping gas within the U.S. There are no domestic LNG tankers, mostly because the hundred-million-dollar-plus ships are much less expensive to build in Asia. So consumers in New England relied on importing liquefied natural gas from Trinidad and Tobago and even Russia to keep prices in check this past winter.



Sections of steel pipe lie in a staging area before being installed underground in Exton, Pa., in June. PHOTO: ROBERT NICKELSBERG/GETTY IMAGES

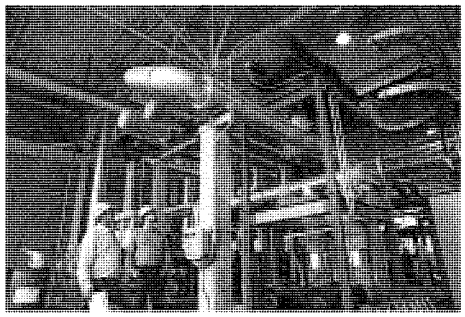
In New York, commercial real-estate broker John Barrett said he was completing the sale of a development that would become a 66-unit apartment building, when Consolidated Edison Inc. announced it would no longer take on new gas customers after March 15 in the southern part of Westchester County. The developer canceled the deal signing and backed out of the purchase two weeks later.

The future of a nine-figure development in New Rochelle, which would include a new city hall, fire station and affordable housing units, is suddenly in doubt. In Yonkers, Mayor Mike Spano worries that the gas moratorium will foul up plans for a mixed-use development on a big downtown parking lot.

Homes that don't come with natural gas lines are now a tougher sell, said Mark Nadler, director of Westchester sales at Berkshire Hathaway Homeservices, unless buyers don't mind cooking

on an electric range or refilling tanks of heating oil each autumn.

Con Edison is trying to adapt to a world without additional pipelines. Scott Butler, from the company's "utility of the future" department, said the team has explored trucking in emergency fuel supplies and even making its own fuel. The utility has proposed building three new facilities in the New York City area to turn compost and food scraps into gas. It is also planning to haul in natural gas on trucks, as many as 180 of them on the coldest days.



A Williams natural gas metering and regulation facility in Brooklyn, N.Y. PHOTO: CLAUDIO PAPAPIETRO FOR THE WALL STREET JOURNAL

National Grid PLC, which serves Long Island, including the boroughs of Brooklyn and Queens, stopped processing new customer requests in May after the state's environmental agency denied a permit to add capacity to the supply line beneath Lower New York Bay. One of the first projects notified earlier this year was the $1 billion arena where the National Hockey League's Islanders are planning to play.

"It will basically put economic growth at a halt," Keith Rooney, director of community and customer management at National Grid, told a gas-industry gathering in April in Hartford, Conn. "It's going to start with the big customers and go all the way down to mom-and-pops."

At issue are plans to boost capacity at the northern end of the 10,000-mile Transco pipeline, owned by Tulsa, Okla.-based Williams Co s. It would involve stretches of new pipe in New Jersey and Pennsylvania, and about 23 miles more that need to be laid alongside existing supply lines on the ocean floor around New York City.

For years Williams has fought with Gov. Andrew Cuomo's administration over the company's plans to build the Constitution Pipeline, a 125-mile pipeline that would carry shale gas from wells in northern Pennsylvania to upstate New York. The costs to build overland pipelines like Constitution have eclipsed what Williams spends on much more technologically

challenging projects like pipelines laid deep offshore in the Gulf of Mexico, said Alan Armstrong, Williams's chief executive.

"At a time when the federal government has abdicated its responsibility to protect our environment and public health, states like New York are on the front lines of protecting our clean water and the public health," Mr. Cuomo said in a statement earlier this year.

Raising resistance

Natural gas has long been considered a transition fuel—a placeholder that's cleaner-burning than coal or oil but more dependable than renewables like wind or solar. But natural gas still releases carbon dioxide into the atmosphere, and fracking has its own environmental consequences, including the production of toxic wastewater. That has raised resistance to building new pipelines as well as enlarging old ones.

Opponents say they are vaulting cities into the future of clean energy. More than 40,000 people and organizations wrote to the New York environmental agency asking it to deny Williams permission for the expansion. In March, New Jersey residents lined up in a middle-school auditorium to oppose the project, including plans for a compressor station Williams wants to build there as part of the expanded supply route into New York. Over three hours, seven attendees spoke against the project for every one who stood to support it.

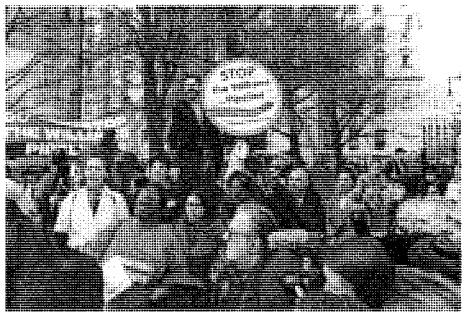
Locals worried about flooding, water contamination and the risk of explosion. One woman used her three minutes at the microphone to read a list of lawsuits and accidents in which Williams has been involved.

"We built our home here thinking this would be our forever home," said Eileen Balaban-Eisenberg, who has helped organize opponents of the pipeline at the nearby retirement community Princeton Manor. "Due to the environmental impacts, it makes us think twice about staying."

In June, the New Jersey Department of Environmental Protection joined New York regulators in denying Williams permits, citing risks to water quality as well as to wetlands near the proposed compressor where the protected Barred Owl was spotted this spring.

Williams said it is addressing the concerns raised by environmental regulators in both states and has resubmitted its applications for construction permits.

"In some cases there are hundreds of millions of dollars in development for a project that is stymied through the regulatory and political process," said Coralie Carter Sculley, marketing director at Tennessee Gas Pipeline, a subsidiary of Kinder Morgan Inc. that brings gas into Westchester, at the industry event in April. "We're not going to have a huge pipeline running through the Northeast again."



A protest to stop construction of a Williams natural gas pipeline in April in New York City. PHOTO: MICHAEL BROCHSTEIN/ZUMA PRESS

SHARE YOUR THOUGHTS

How can the U.S. best keep up with energy demand? Join the conversation below.

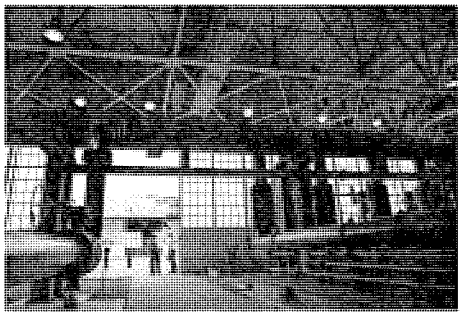
In Seattle's northern suburbs, Williams spent more than four years trying to get permission to dig up about 6 miles of an 8-inch-diameter gas line it owns and replace it with a 20-inch pipe to keep up with demand from the new homes being built there. The cost of the project, which Williams hopes to start this summer, has grown from about $6 million to more than $50 million due to delays in receiving permits, said Mr. Armstrong.

It's the sort of routine project that wouldn't have crossed the CEO's desk a decade ago. "That is such a simple piece of work," Mr. Armstrong said. "It's hard for me to even talk about it because it's repulsive how much money has been spent there."

Pipeline supporters argue that the blockades keep them mired in the past. Technologies like heat pumps, which transfer warmth between homes and the surrounding ground or air, promise low-carbon futures, but they are costly and complex. Absent cheap natural gas, that leaves dirtier fuels like oil and propane to keep the heat on during the cold winter months.

With limited pipelines to smooth the distribution of gas around the country, price spikes have become wild. In 2018, natural gas prices in New York City surged as high as $175 during a snowstorm that spurred record heating demand. A week later, they returned to about $3. Though prices in northern Washington hit a historic $200 this year, more recently they traded at less than $2 as regional stockpiles were replenished and winter demand dissipated.

In late April, a few weeks after its gas moratorium went into effect, Con Edison said it had



Williams's natural gas metering and regulation facility in Brooklyn. PHOTO: CLAUDIO PAPAPIETRO FOR THE WALL STREET JOURNAL

reached an agreement with Kinder Morgan, which owns the intrastate pipeline that supplies southern Westchester, to boost capacity. The catch: It could be 2023 before the work is completed.

Write to Stephanie Yang at stephanie.yang@wsj.com and Ryan Dezember at ryan.dezember@wsj.com

Appeared in the July 8, 2019, print edition as 'U.S. Gas Boom Hits Pipeline Snag.'

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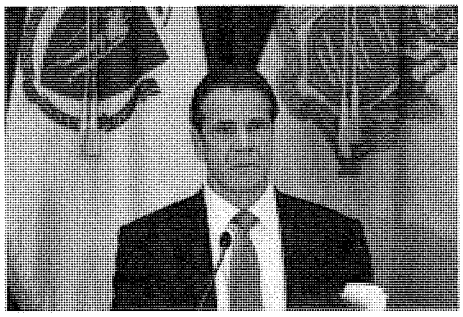
OPINION | REVIEW & OUTLOOK

Cuomo's Carbon Contradiction

After blocking pipelines, he bullies a firm to deploy natural gas this winter.

By The Editorial Board
Oct. 20, 2019 4:19 pm ET



New York Governor Andrew Cuomo in New York City, Oct. 17. PHOTO: LUCAS JACKSON/REUTERS

New York Governor Andrew Cuomo has a habit of bullying others to cover for and fix his policy blunders. In another display of political grace, Mr. Cuomo has ordered the utility National Grid to resume natural-gas hookups that were suspended after his senseless pipeline veto this spring.

Mr. Cuomo wants to make New York ground zero in the left's plan to purge fossil fuels. First he banned shale fracking in southern New York despite its huge potential to boost local economies. Then he blocked a natural-gas pipeline from Pennsylvania that would have reduced energy bills and reliance on heating oil.

As a coup de grâce, in May he vetoed another pipeline to bring natural gas to Long Island from New Jersey. National Grid, which provides natural gas on Long Island, responded rationally by imposing a moratorium on natural-gas hookups to prevent supply disruptions when demand spikes in the winter.

This essentially stranded tens of thousands of folks waiting for gas hookups, including more than a thousand who had deactivated their service after moving or renovating. Apparently Mr.

Cuomo didn't understand that the result of his pipeline blockade was to force residents to use more expensive and less-efficient electric appliances for space and water heating.

After folks on Long Island protested—one homeless shelter estimated that electrification would cost an additional $200,000—Mr. Cuomo last week ordered National Grid to reconnect over a thousand customers. He also directed state regulators to investigate National Grid's decision to disrupt natural gas service and threatened to yank its monopoly.

National Grid now says it plans to truck in compressed natural gas to meet peak demand. Exactly how will this reduce CO2 emissions? The utility won't be able to guarantee uninterrupted service for the tens of thousands of customers who want to switch to natural gas from heating oil, which emits 38% more CO2. About a quarter of New York households rely on heating oil.

According to the Energy Information Administration, the average household that uses natural gas for heating this winter will spend $580 compared to $1,501 for heating oil and $1,162 for electricity. A household that uses natural gas for space and water heating instead of electricity will save about $2,400 per year.

Consider this another parable of how the political campaign to ban fossil fuels is detached from energy and economic reality. And when reality bites and consumers suffer, politicians like Mr. Cuomo blame someone else to deflect from their own policy mistakes.

September 6, 2018

The Honorable John Barrasso
U.S. Senate Environment &
Public Works Committee
410 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable Thomas R. Carper
U.S. Senate Environment &
Public Works Committee
456 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Senators Barrasso and Carper:

The Association of Clean Water Administrators (ACWA) and the Association of State Wetland Managers (ASWM) write to you today to express our concerns over the Water Quality Certification Improvement Act of 2018 (S. 3303). Our members believe that by curtailing §401 authority, S. 3303 would diminish states' ability to manage and protect water quality within their boundaries, contrary to the principles of cooperative federalism upon which the Clean Water Act (CWA) is based.

ACWA is the independent, nonpartisan, national organization of state, interstate, and territorial water program managers, who on a daily basis implement the water quality programs of the CWA, as well as the comprehensive and diverse set of state water programs that exist beyond the CWA. ASWM plays a similar role nationwide working directly with state and tribal wetland managers who administer wetland programs both as required by the CWA and independent of the CWA.

States are responsible, under both the CWA and a state's own laws and regulations, to advance the attainment of clean and healthy waters and to prevent violations of the water quality standards designed to achieve these goals. In the CWA, Congress purposefully designated states as co-regulators and tasked states with most implementation responsibilities as part of a system of cooperative federalism recognizing state interests and authority. This cooperative co-regulator relationship works and has stood the test of time.

If enacted as written, S. 3303 would modify the CWA, and limit the states' authority under §401 to protect state water quality and provide critical input on the impacts posed by federal permits and licenses. States are best suited to determine whether a federally permitted activity will fully protect a state's designated uses because states comprehensively manage water quality and water quantity within their borders. It is well established[1] that §401 authorizes states to consider additional requirements or limitations on the potential permitted activity once it is determined that the activity will result in a discharge to waters. Curtailing or

[1] PUD No. 1 of Jefferson Co. v. Washington State Dept. of Ecology, 511 U.S. 700 (1994).

reducing state authority or limiting the vital role of states in maintaining water quality within their boundaries would inflict serious harm to the collaborative and cooperative relationship established by Congress when passing the CWA, undermining state expertise and experience with local waterbodies. We firmly believe that any legislative or regulatory effort to streamline environmental permitting should be developed in consultation with states and must not occur at the expense of clearly articulated statutory authority delegated to states.

The states have decades of experience implementing §401 authority to review the water quality impacts of federal licenses and permits, impose water quality conditions where necessary, and, in rare cases, withhold water quality certification entirely. Section 401 certification is not the obstacle to issuing federal permits or licenses that some supporters of §401 reform claim, as most state §401 certifications are issued within a year of their request. We believe states have acted efficiently under this authorization, as required by the regulations related to §401, in certifying projects, establishing procedures, and providing primary responsibility to ensure that water quality standards are met and believe the problems identified by supporters of these efforts are exaggerated.

States' certainly recognize and appreciate that regulated entities depend on efficient and timely responses to certification requests and strive to complete their reviews in a timely and efficient manner. As mentioned earlier, the majority of certifications are indeed issued in timely fashion, with few exceptions. In these rare instances, states often encounter challenges in issuing timely responses due to actions or inactions by the project proposers themselves. Examples of these challenges include: 1) incomplete or inconsistent application packages that are missing key information, and/or maps that would enable states to make an informed decision on a project or the project scope, 2) design or construction plans that may have been altered without supplying regulators with updates on the impacts of the changes,3) slow responses (and sometimes refusals) by regulated entities to respond to state requests for information needed to complete an application and allow for effective review of water quality impacts, and 4) certification requests that are filed prior to completion of all federal permitting reviews.

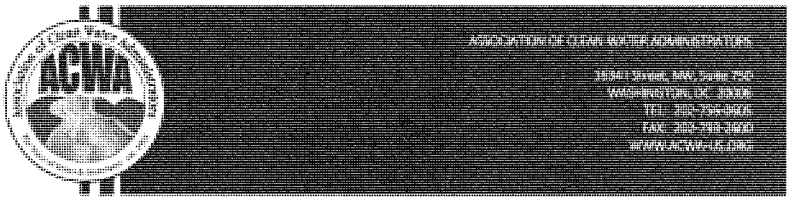
Furthermore, the failure of project applicants and/or federal partners to engage with state regulators early in the planning process can and does lead to unnecessary delays. Meaningful early engagement gives states a chance to raise water quality concerns about projects during the planning process and gives project proposers and federal agencies a chance to address those concerns in ways that facilitate the certification process and protect water quality. Early engagement also ensures that states have timely access to the information they need to make informed certification decisions. The recent limited instances where projects have been stopped due to a water quality certification denial are not adequate to justify minimizing clearly authorized state authority to manage and protect the water resources in their states.

In closing, we would like to discuss your proposed legislation and the importance of clearly preserving state's rights under the CWA, to ensure that any efforts to enhance efficiency do not come at the expense of water quality and do not minimize state experience, expertise, and statutory authority. Thank you for your consideration of our concerns.

Sincerely,

Julia Anastasio
Executive Director & General Counsel
ACWA

Marla Stelk
Executive Director
ASWM



401 Certification Survey Summary
May 2019

On April 10, 2019, the White House issued the *Executive Order on Promoting Energy Infrastructure and Economic Growth*. Part of the executive order called for reforms to Clean Water Act ("CWA") Section 401 certification processes. Therefore, EPA announced that the Agency would engage with states, authorized tribes, and relevant federal agencies to identify provisions requiring clarification within CWA Section 401 and related federal regulations and guidance. EPA is taking pre-proposal recommendations on the issue.

To assist in responding to EPA's efforts, ACWA released a survey to states inquiring into state Section 401 certification processes including the average number of state certification requests and denials, certification timeliness, application completeness, and best practices.

ACWA received thirty-one (31) responses to the survey. The results show that states work hard to issue Section 401 certifications in a timely manner and very rarely issue denials of certification. Specifically, for the thirty-one (31) states that responded the median of the average number of requests for certification received per state per year is approximately seventy (70) (the survey found a large range of average annual number of certification requests. At the high end, Michigan has approximately 5000 requests and New York approximately 4000 annual requests. At the low end, New Hampshire has approximately ten (10) annual requests and South Dakota approximately fifteen (15) requests). The average length of time it takes these states to complete a certification once a complete application is received is approximately 132 days (under 4.5 months). Seventeen (17) states average zero (0) denials per year. The rest of the states very rarely issue denials of certification.

Regarding certification delays, states cited many reasons. The most common reason for certification delays cited by states was incomplete requests. Other reasons for delays cited by multiple states included slow responses from applicants, time taken responding to public comments, negotiating conditions necessary to protect water quality, and staff workload issues.

Though delays sometimes occur, states have taken significant steps to ensure timely Section 401 certifications. Most states either require or encourage pre-submittal meetings with applicants. States have also adopted electronic submittal and hired additional staff to assist with making certifications. Regulatorily, states have clarified "completeness" of requests and set hard time limits for review in state regulations.

Because it is the most common reason for certification delays, states have taken significant steps to inform applicants what constitutes a "complete" request. Twenty-one (21) states either have regulations that explain completeness, accept the federal Army Corps of Engineers application, or clearly list requirements on the application. Many states work with applicants through early engagement to ensure applicants are aware of request requirements.

States also employ a series of "best practices" to ensure complete requests and timely certifications. Twenty-seven (27) states require or encourage pre-request meetings with applicants or their consultants or have clear application instructions. State websites often have guidance documents and other materials to assist applicants. States also reach out directly to applicants when requests are incomplete.

ACWA purposely kept this survey simple. Therefore, there may be nuance to specific state 401 certification programs and efforts not reflected in the survey results or in this summary.

For more information on this survey, contact ACWA's Mark Patrick McGuire at mpmcguire@acwa-us.org.

November 26, 2019

The Honorable John Barrasso
Chairman
U.S. Senate Environment & Public Works Committee
410 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable Thomas R. Carper
Ranking Member
U.S. Senate Environment & Public Works Committee
456 Dirksen Senate Office Building
Washington, D.C. 20510

RE: S. 1087 – Water Quality Certification Improvement Act of 2019

Dear Chairman Barrasso and Ranking Member Carper:

The Association of Clean Water Administrators (hereinafter "ACWA" or the "states") is the independent, nonpartisan, national organization of state, interstate, and territorial water program managers, who on a daily basis implement the water quality programs of the Clean Water Act ("CWA").

ACWA writes you to express our concerns over the *Water Quality Certification Improvement Act of 2019* (S. 1087). As expressed in a previous letter to you on the *Water Quality Certification Improvement Act of 2018* (S. 3303), states have consistently exercised their statutorily granted authority under CWA Section 401 in an efficient, effective, and equitable manner and as such, we think this legislation is unnecessary. Curtailing or reducing state authority under Section 401, or the vital role of states in maintaining water quality and protecting water resources within their boundaries, would inflict serious harm to the division of state and federal authorities established by Congress. Any statutory change to the Section 401 permitting process should not come at the expense of state authority and should be developed through genuine consultation with state environmental and public health agencies. Congress should ensure the CWA continues to effectively protect water quality, while maintaining the partnerships and the essential balance of authority between states and the federal government.

Moreover, given that EPA is currently in the middle of a rulemaking process to update the Section 401 regulations, ACWA's members question the need for legislative action at this time. The rulemaking process ensures that the public and interested stakeholders have an opportunity to participate, provide additional data and details to the rulemaking agency, and offer real-world implications of proposed changes to regulators and regulated entities. To ensure clarity and minimize confusion for states implementing Section

401, the Senate should refrain from action on S. 1087 until EPA completes its rulemaking process. Further, before you proceed with S. 1087 ACWA would like to meet with your staff to discuss the legislation and provide you with information on the potential ramifications to state resources, both intended and unintended, of the proposed changes to Section 401.

As stated above, ACWA's members have consistently exercised their statutorily granted authority under Section 401 in an efficient, effective, and equitable manner. In May 2019, ACWA completed a survey to states inquiring into state Section 401 certification processes (See attached *401 Certification Survey Summary – May 2019*). ACWA received thirty-one (31) responses to the survey. The results show that the median of the average number of certification requests received per state per year is approximately seventy (70)[1]. The average length of time it takes these states to complete a review once a request with all necessary information is received is approximately 132 days (under 4.5 months). Seventeen (17) states average zero (0) denials per year. The rest of the states very rarely issue denials of certification. States most often work diligently with applicants to make certifications in a timely manner.

Though delays occur, for reasons such as incomplete requests, slow responses from applicants, state public comment periods, lengthy negotiations, and staff workload, states have taken significant steps to ensure timely Section 401 certifications. Most states either require or encourage pre-submittal meetings with applicants. States have also adopted electronic submittal and hired additional staff to assist with making certifications. Regulatorily, states have clarified "completeness" of requests and set hard time limits for review in regulations.

Because it is the most common reason for certification delays, states have taken significant steps to inform applicants what constitutes a "complete" request for certification. Twenty-one (21) states either have regulations that explain completeness, accept the federal Army Corps of Engineers application, or clearly list requirements on state applications. Some states work with applicants through early engagement to ensure applicants are aware of request requirements.

States also employ a series of "best practices" to ensure complete requests and timely certifications. Twenty-seven (27) states require or encourage pre-request consultations with applicants or their consultants or have clear request instructions. State websites often have guidance documents and other materials to assist applicants. States also reach out directly to applicants when requests are incomplete.

The results of the survey show that states have been effectively and efficiently utilizing Section 401 authority to protect their water resources.

In conclusion, we urge Congress to hold off on any legislative changes that may diminish, impair, or subordinate states' authority under the CWA or the ability of states and their designated entities to manage or protect water resources. Further, the Senate should refrain from action on S. 1087 until EPA completes its ongoing rulemaking. Simultaneously, ACWA would like to meet with your staff to discuss the legislation and the importance of preserving states' rights under the CWA,

[1] The survey found a large range of average annual number of certification requests. At the high end, Michigan has approximately 5000 requests and New York approximately 4000 annual requests. On the low end, New Hampshire has approximately 10 annual requests and South Dakota approximately 15 requests.

to ensure that any efforts to enhance efficiency do not come at the expense of water quality and do not minimize state experience, expertise, and authority.

Thank you for your consideration of our concerns. Please contact ACWA's Executive Director Julia Anastasio at janastasio@acwa-us.org or (202) 756-0600 with any questions regarding ACWA's letter.

Sincerely,

Melanie D. Davenport

Melanie Davenport
ACWA President
Water Permitting Division Director
Virginia Department of Environmental Quality

Enclosures:

ACWA Comment Letter – 401 Certification Proposed Rule – 10-21-19
ACWA Comment Letter – 401 Certification Pre-Proposal Recommendations – 5-24-19
ACWA 401 Cert State Survey Summary – May 2019
Coalition Letter – Clean Water Act Section 401 Process Improvements...State Authority – 2-20-19
ACWA-ASWM Coalition Letter – S3303 – 9-6-2018

November 19, 2019

The Honorable John Barrasso
Chairman
Committee on
Environment and Public Works
United States Senate
Washington, D.C. 20510

The Honorable Thomas R. Carper
Ranking Member
Committee on
Environment and Public Works
United States Senate
Washington, D.C. 20510

Dear Chairman Barrasso and Ranking Member Carper:

On behalf of our millions of members and supporters nationwide, we write in opposition to S. 1087, the "Water Quality Certification Improvement Act of 2019" and any other efforts to weaken state authority under section 401 of the Clean Water Act (CWA). Beyond there being no basis to undercut the law hailed as a prime example of cooperative federalism, the legislation would remove key protections for Native, rural, and socioeconomically disadvantaged communities that have been fought to stem the marginalization accompanying resource extraction for decades.

In 2006, the United States Supreme Court unanimously ruled that "[s]tate certifications under [Section] 401 are essential…to preserve state authority to address the broad range of pollution." We agree, which is why we urge the Committee to reject S. 1087.

Since its enactment, states and authorized tribes have depended on the Clean Water Act section 401 certification process to ensure that projects requiring federal licenses and permits will not harm the waters within their borders—projects like dams, river alterations, wetland fills, and interstate pipelines. Through section 401, for example, states and authorized tribes have required that federally-permitted dams preserve stream flow necessary for aquatic life and provide fish passage for spawning; that pipeline projects control runoff and other water pollution; and that marsh and wetland destruction be avoided, minimized, and mitigated. Congress recognized the critical role that states and authorized tribes have in managing their natural resources. This legislation, S. 1087, would upend this carefully crafted dual federalism process.

In particular, this proposed legislation would impact a state's role in hydropower relicensing. Because hydropower licenses are issued for up to 50 years, many hydropower facilities that are now coming up for relicensing were first constructed before virtually all modern environmental laws were in place. It is during relicensing proceedings that the public gets the opportunity to ensure that dam owners make the necessary changes to comply with modern laws. The opportunity to mitigate for the damage to the environment, while still providing reliable electricity, only arises once in a generation or two. S. 1087 would significantly curtail state and tribal authority to ensure the licenses include conditions that protect state water quality standards and beneficial uses.

Not only would S. 1087 lead to an overly narrow reading of section 401, it would deprive states and authorized tribes of the ability to maintain the beneficial uses of water the Clean Water Act was designed to protect. Federal agencies would be able to override state and tribal concerns and permit activities and projects that would directly conflict with state and tribal investments in pollution control programs, fish recovery programs, temperature control mechanisms, minimum-flow requirements, and other essential activities.

S. 1087 subordinates the expertise of state and authorized tribal regulators and the interests of state and tribal governments to the interests of the federal government. For example, when certifying a federal permit, some states may find it necessary to condition the certification on meeting state buffer requirements to ensure state water quality standards are not impacted. S. 1087 would remove that state authority. S. 1087 also limits state analysis to only discharges, which could be interpreted to prevent a state from considering the impact of a project or activity on increased impervious surfaces and associated impacts to water quality or on what are often considered "downstream" consequences of discharges.

Furthermore, this legislation places unreasonable time constraints on states during the 401 certification process. For instance, by limiting state and authorized tribal agencies to 90 days in which to identify all necessary materials, information, or deficiencies in an application for certification, S. 1087 may force the states to make decisions without all of the relevant information. The legislation creates a dynamic wherein states and authorized tribes must either exercise their authority without necessary information (which exposes them to legal liability) or fail to meet the schedule, thereby waiving their certification authority altogether. Too often, delays in application review are the foreseeable result of applicants providing insufficient information to the states and authorized tribes. Such a severe restriction on the time for review constrains state, and tribal agency decision making, potentially making it more difficult to protect water quality, recover threatened and endangered species, and manage tribal-trust resources and public lands. The legislation may also increase delays by forcing states and authorized tribes to deny certifications more often because they will not have enough information to make a certification decision. Federal agencies and developers may also be incentivized to withhold information in order to get a decision within a certain period of time.

In addition to considering this legislation, the Committee should also consider EPA's current 401 rulemaking, as a result of the President's directive in Executive Order 13868, "Promoting Infrastructure and Economic Growth." This Executive Order instructed EPA to promulgate a rule that would similarly restrict the 401 certification process, without basis. Furthermore, the Executive Order demands the rewrite of a resource-protective statute to give way to the construction of pipelines and other energy infrastructure. EPA's attempt to diminish 401 authority directly contravenes Congress's goal for the Clean Water Act: "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."

As of the writing of this letter, EPA's docket for the proposed rule, ID No. EPA-HQ-OW-2019-0405, has received 106,896 public comments, the overwhelming majority in opposition to the proposal. States as varied in their approaches to natural resource management as California and South Dakota are opposed to the rule and its impact on their authority. Many tribes, after not receiving requested and required government-to-government consultation, also oppose the violation of their rights and the degradation of the United States' responsibility to uphold their treaty rights and fulfil its trustee obligations.

A vital component of the Clean Water Act's system of cooperative federalism is state authority under Section 401 to certify and condition federal permits of projects that discharge into waters of the United States. This authority has helped ensure that activities associated with federally permitted projects will not harm waters. S. 1087 does not reflect the historical relationship between states and the federal government with respect to managing water, and instead would upset the careful balance between the states, authorized tribes, and the federal government inherent in the Clean Water Act. By seizing power from states and tribes, S. 1087 puts the interests of power companies, pipelines, railroads, and other developers ahead of the interests of the states and the public that wants to enjoy access to clean water.

We urge the Committee to reject S. 1087.

Sincerely,

American Sustainable Business Council
Appalachian Trail Conservancy
Center for Biological Diversity
Clean Water Action
Earthworks
Environmental Law & Policy Center
GreenLatinos
Healthy Gulf
League of Conservation Voters
Montana Trout Unlimited
Natural Resources Defense Council
Rachel Carson Council
River Network
Save EPA
Sierra Club
Southern Environmental Law Center

STATE OF WASHINGTON
DEPARTMENT OF ECOLOGY
PO Box 47600 • Olympia, WA 98504-7600 • 360-407-6000
711 for Washington Relay Service • Persons with a speech disability can call 877-833-6341

November 18, 2019

The Honorable John Barrasso
Chairman, Senate Environment and Public Works Committee
307 Dirksen Senate Office Building
Washington DC, 20510

The Honorable Tom Carper
Chairman, Senate Environment and Public Works Committee
513 Hart Senate Office Building
Washington DC, 20510

Dear Chairman John Barrasso and Ranking Member Tom Carper:

I write ahead of the Senate Environment and Public Works Committee's second hearing regarding the Water Quality Certification Improvement Act as well the U.S. Environmental Protection Agency's (EPA) proposed rule to undercut state authority under Section 401 of the Clean Water Act. I am attaching the letter I wrote to this Committee in August of 2018, before the first hearing of this bill, clarifying the details of the Washington State Department of Ecology's (Ecology) denial of a water quality certification to the Millennium coal export terminal on the Columbia River.

Since then, the Pollution Control Hearings Board has upheld Ecology's decision. Contrary to the company's allegations, no court that has reviewed the decision concluded that Ecology denied the project based on improper factors.

Yet, EPA's proposed rule cites my agency's denial of a water quality certification for the Millennium project as a basis for these drastic measures. For two years we have been falsely accused of "abusing our 401 authority" and denying the project based on our so-called philosophical opposition to coal.

The fact is that our decision was based on the project's failure to meet water quality standards, and its further failure to meet our state's environmental standards. The project proponent failed to provide mitigation for the areas the project would devastate, especially along the Columbia River. The environmental analysis demonstrated that this project would have destroyed 24 acres of wetlands and 26 acres of forested habitat, as well as dredged 41 acres of river bed. It would

have contaminated stormwater from stockpiling 1.5 million tons of material onsite near the river — picture, if you will, an 85-foot-high pile of coal running the length of the National Mall, from the steps of the Capitol to the foot of the Lincoln Memorial.

In short, there were many insolvable problems with the Millennium project — I have named only a few. I am confident in the work my agency has done to protect Washington State from the Millennium project's irreparable harm. It was correctly and properly denied under our Section 401 authority, which is further demonstrated by the multiple court rulings that have upheld our decision.

This is an indicator that Section 401 is working just as Congress intended. In the past 50 years, Washington State has approved thousands of 401 water quality certifications, hundreds with conditions, and denied approximately 30. Only a few have been appealed.

Congress empowered states with the primary responsibility of protecting water quality within our borders. Nowhere is this more important than Washington State. The health of the Columbia River, and all of Washington's waters, is vital to our state's agriculture and manufacturing economies, central to our energy production, and relied upon by Washington's 29 federally recognized Native American tribes. It is also critical to maintaining the healthy environment that Washingtonians treasure.

I am gravely concerned by any rule or legislation that erodes state authority to carry out this important responsibility. I urge you to consider the facts surrounding this denial and the ramifications of rolling back state authority to protect water quality across the nation.

Sincerely,

Maia D. Bellon
Director